

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 558

UNITED STATES, PETITIONER,

vs.

TROYIT ROBINSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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1 IN UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal No. 63-58

UNITED STATES OF AMERICA

v.

#2 TROYIT ROBINSON

Docket Entries

1. Indictment or information for Second Degree Murder
Filed January 27th, 1958.
2. Arraignment January 31st, 1958.
3. Plea to indictment or information not guilty January
31st, 1958.
4. Motion to withdraw plea of guilty denied 19
5. Trial by jury begun March 25th, 1958.
6. Verdict of guilty of Manslaughter April 2nd, 1958.
7. Judgment—(with terms of sentence) or order May
2nd 1958; Four (4) years to Twelve (12) years Curran, J.
Entered May 2nd, 1958.
8. Notice of appeal filed May 28th, 1958.
- Dated June 2nd 1958.

HARRY M. HULL, *Clerk*
Attest HELEN M. BROSAN
Deputy Clerk.

(SEAL)

IN UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Filed May 7, 1958, Harry M. Hull, Clerk

No. 63-58

UNITED STATES OF AMERICA

v.

TROYIT ROBINSON

On this 2nd day of May, 1958 came the attorney for the government and the defendant appeared in person and¹ by counsel, Wm. Stempil, Esq.

Judgment and Commitment—May 2, 1958

IT IS ADJUDGED that the defendant has been convicted upon his plea of² Not Guilty and verdict of guilty of the offense of Manslaughter as charged³ under the indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of⁴ Four (4) years to Twelve (12) years.

¹Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." ²Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. ³Insert "in count(s) number" if required. ⁴Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. ⁵Enter any order with respect to suspension and probation. ⁶For use of Court wishing to recommend a particular institution.

It Is ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

EDWARD M. CURRAN,
United States District Judge.

.....
Clerk.

3 IN UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

(File Endorsement Omitted)

Criminal No. 63-58

UNITED STATES OF AMERICA

v.

#2 TROYIT ROBINSON

Notice of Appeal—Filed May 28, 1958

Name and address of appellant Troyit Robinson, 200 19 St. SE DC Jail.

Name and address of appellant's attorney I. Wm Stempil, 501 13 St NW.

Offense Manslaughter.

Concise statement of judgment or order, giving date, and any sentence, 4-12 yrs in a reformatory May 2, 1958.

Name of institution where now confined, if not on bail DC Jail, 200 19 St SE.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

TROYIT ROBINSON
Appellant

I. WM. STEMPIEL
Attorney for Appellant.

Date 5 28 58

(SEAL)

IN UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

(File Endorsement Omitted)

Criminal No. 63-58

UNITED STATES

v.

TROYIT ROBINSON

**Affidavit in Support of Application for Leave to Proceed
Without Prepayment of Costs—Filed May 28, 1958**

I, Troyit Robinson, being first duly sworn according to law, depose and say that I am the _____ in the above-entitled cause, and, in support of my application for leave to proceed in said cause without being required to prepay fees or costs, state as follows:

1. That I am a citizen of the United States.
2. That because of my poverty I am unable to pay the costs of said suit or action.
3. That I am unable to give security for the same.
4. That I believe I am entitled to the redress I seek in said suit or action.
5. That the nature of my cause of action is briefly stated as follows: The government did not prove its case beyond a reasonable doubt and I acted in self defense.

TROYIT ROBINSON

SUBSCRIBED and SWORN to before me this 28th day of May 1958.

G. E. STOKES

Notary Public, D. C.

(SEAL)

Let the applicant proceed on appeal
without prepayment of costs.

CURRAN

Judge

5

IN UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal No. 63-58

UNITED STATES OF AMERICA

v.

#3 TRAVIT ROBINSON

Docket Entries

1. Indictment or information for Second Degree Murder
Filed January 27th, 1958.
2. Arraignment January 31st, 1958.
3. Plea to indictment or information not guilty January
31st, 1958.
4. Motion to withdraw plea of guilty denied 19
5. Trial by jury, or by court if jury waived begun March
25th, 1958.
6. Verdict guilty of Manslaughter April 2nd, 1958.
7. Judgment—(with terms of sentence) or order May
2nd 1958; Four (4) years to Twelve (12) years; Curran, J.
Entered May 7th, 1958.
8. Notice of appeal filed May 28th, 1958.
Dated June 2nd, 1958.

Attest HARRY M. HULL, *Clerk*,
United States District Court
For the District of Columbia
By HELEN M. BROSNAN,
Deputy Clerk.

(SEAL)

IN UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Filed May 7, 1958, Harry M. Hull, Clerk

No. 63-58

UNITED STATES OF AMERICA

v.

TRAVIT ROBINSON

On this 2nd day of May, 1958 came the attorney for the government and the defendant appeared in person and¹ by counsel, Wm. Stempil, Esq.

Judgment and Commitment—May 2, 1958

IT IS ADJUDGED that the defendant has been convicted upon his plea of² Not Guilty and verdict of guilty of the offense of Manslaughter as charged³ under the indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of⁴ Four (4) years to Twelve (12) years.

¹ Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." ² Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. ³ Insert "in count(s) number" if required. ⁴ Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. ⁵ Enter any order with respect to suspension and probation. ⁶ For use of Court wishing to recommend a particular institution.

7
It Is ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

EDWARD M. CURRAN,
United States District Judge.

.....
Clerk.

7
IN UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

(File Endorsement Omitted)

Criminal No. 63-58

UNITED STATES OF AMERICA

v.

#3 TRAVIT ROBINSON

Notice of Appeal—Filed May 28, 1958

Name and address of appellant Travit Robinson c/o
District Jail, 200-19 St SE Washington, D.C.

Name and address of appellant's attorney I. William
Stempil 501-13 St NW-Wash DC.

Offense Manslaughter.

Concise statement of judgment or order, giving date,
and any sentence 4-12 years, guilty of manslaughter-May
2, 1958- to serve sentence in a reformatory.

Name of institution where now confined, if not on bail
D.C. Jail—200 19 St SE Wash DC.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

TRAVIT ROBINSON
Appellant

I. WILLIAM STEMPLE
Attorney for Appellant

(SEAL)

Date May 28, 1958

A True Copy

Test:

HARRY M. HULL, *Clerk,*

By HELEN M. BROSNAN, *Deputy Clerk.*

IN UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

(File Endorsement Omitted).

Criminal No. 63-58

UNITED STATES

v.

TRAVIT ROBINSON

**Affidavit in Support of Application for Leave to Proceed
Without Prepayment of Costs—Filed May 28, 1958**

I, Travit Robinson, being first duly sworn according to law, depose and say that I am the in the above-entitled cause, and, in support of my application for leave to proceed in said cause without being required to prepay fees or costs, state as follows:

1. That I am a citizen of the United States.
2. That because of my poverty I am unable to pay the costs of said suit or action.
3. That I am unable to give security for the same.
4. That I believe I am entitled to the redress I seek in said suit or action.

5. That the nature of my cause of action is briefly stated as follows: I was found guilty of manslaughter after the Govt did not sustain the burden of having to prove me sane after evidence was introduced that I was temporarily insane at the time of the homicide. There was also evidence that I acted in self defense. The Govt.'s witness changed his testimony from the time he gave it at the Coroner's inquest.

TRAVIT ROBINSON

SUBSCRIBED and SWORN to before me this 28th day of May 1958.

G. E. STOKES

Notary Public, D. C.

(SEAL)

Let the applicant proceed on appeal without prepayment of costs, and let the transcript be furnished to defendant at the cost of the United States of America.

EDWARD M. CURRAN

Judge

9 IN UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

(File Endorsement Omitted)

Misc. No. 1030

United States District Court Case # 63-58 Criminal

TRAVIT ROBINSON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

**Petition for Leave to Prosecute Appeal In Forma Pauperis and
Affidavit in Support Thereof—Filed May 29, 1958**

The petitioner, Travit Robinson, being first duly sworn on oath, deposes and says

That he is a citizen of the United States and the petitioner in the above entitled cause and that he is unable to pay the costs of said appeal or to give security for the same; and that he believes he is entitled to redress.

Your petitioner further states that subsequently to the entry of the judgment in this case—4 to 12 years in a reformatory, an application in conformity with Sec. 1915, Title 28 U.S. Code, was on May 28, 1958 to the trial court for permission to permit the petitioner to prosecute an appeal in forma pauperis and that the United States furnish a copy of the transcript to my attorney and granted. He advises me further that he was under the impression that after my return to the D.C. Jail on May 2, 1958, that I had filed the notice of appeal, and I was under the impression that he had done so since I heard him say that the case would be appealed on that day. I had been told by other inmates at the Jail that I should file the appeal myself and had mentioned it to my counsel that day, and we left it that way. Either I misunderstood him or he was under the impression that I would take the first step and that he would follow it up after trying to contact my relatives to see what they would do for me as far as costs were concerned. He later advised me that they had pleaded poverty too and could not help me, and no mention was made of the question whether the notice of appeal was filed at that time.

That the nature of the appeal is as follows:

On May 2, 1958 the court sentenced me to 4 to 10 to 12 years in a reformatory after the jury found me guilty of manslaughter with reference to a homicide of December 14, 1957.

That your petitioner was found suffering from temporary insanity and amnesia as a result of first being hit on the head several times by the person I was accused of causing his death who first hit me and then after I wrested the weapon from him, I was told that I had hit him in return and caused his death. Witnesses so testified and they were not disputed.

My condition was attested to by Dr. Elmer Klein, M.D. a psychiatrist with 33½ years experience and accepted by the prosecution as an expert witness. He was qualified without objection.

Dr. Klein was put on the stand in my behalf after the Government had rested. After his testimony, the Government put on Sgt. Donahue a detective assigned to Homicide who testified that he had six and one-half years experience

as a policeman and he testified that in his estimation I was sane when he interviewed me.

Both witnesses testified that they interviewed me for one and one-half hours, Dr. Klein, clinically a few days before my trial and Sgt. Donahue, a few hours after the homicide at Police Headquarters, during the early hours of the morning between 5:30 a.m. and 7:50 a.m.

That the Government did not sustain the burden of the proof of proving me sane after Dr. Klein's testimony (and also the testimony of other witnesses as to my actions and conduct immediately following the homicide) including the testimony of the Dr. at Casualty Hospital who sewed my head up after the homicide.

My lawyer asked the Court for a directed verdict since the Government had not proven beyond the reasonable doubt that I was not insane, but the court refused to do so.

Judge Curran refused to give certain specific instructions to the jury which he was asked to do in writing, but he refused to do so and some instructions he proposed to give were objected to by my counsel.

The only witness the Government produced of any consequence was one Robert Lee Evans who told one story at the Coroner's Inquest two days after the homicide—that the deceased struck the first blow—and then changed his story at the trial—more than three months later—that I started the tussle which resulted in the homicide.

11 That the petitioner pleaded self defense and witnesses testified to that fact.

That your petitioner prays the United States Court of Appeals for the District of Columbia Circuit will examine the entire transcript of his case which is on file with the United States District Court for the District of Columbia.

WHEREFORE, Petitioner Travit Robinson prays that he be allowed to docket and proceed with his appeal in this Court without the required prepayment of fees or costs or give security thereof, and that he be allowed to file an original and six (6) copies of a typewritten brief and appendix thereto in lieu of printing same.

TRAVIT ROBINSON
Petitioner

Washington, D.C., ss

I, Travit Robinson, being first duly sworn, according to law, on oath depose and say that the matters and things stated in the foregoing petition and affidavit by me subscribed as facts are true and that those matters and things stated therein as upon information and belief, I believe to be true.

TRAVIT ROBINSON
Petitioner

Subscribed and sworn to before me this 28 day of May, 1958.

G. E. STOKES
Notary Public, D.C.

My comm. expires Oct. 31, 1960

(SEAL)

I, Travit Robinson, being first duly sworn according to law on oath, deposes and says that I am the petitioner in the above entitled cause and that I have on this day of May, 1958 caused to be mailed a copy of the foregoing petition and affidavit to Hon. Oliver Gasch, Esq. US Atty for the D of C at the US Court House Wash D.C., via US Mail postage prepaid.

TRAVIT ROBINSON
Petitioner

Subscribed and sworn to before me this 28 day of May, 1958.

G. E. STOKES

(SEAL)

12 IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT
(File Endorsement Omitted)

Misc. No. 1030

US DC = Cr. 63-58

TRAVIT ROBINSON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

**Motion for Leave to File the Attached Affidavit and Petition
for Leave to Appeal Without Prepayment of Costs and
Affidavit of Poverty—Filed May 29, 1958**

Comes now the petitioner, Travit Robinson, and prays this Honorable Court to grant him permission to file the attached affidavit and petition for leave to appeal without prepayment of costs and the affidavit of poverty on the grounds that I am without funds and this is the first time I have ever had to do such a thing and because of a misunderstanding between my statements to my attorney and his misapprehension as to my intentions.

Respectfully submitted,

TRAVIT ROBINSON
Travit Robinson

CERTIFICATE OF SERVICE

I, I William Stempil, counsel for Travit Robinson do hereby certify that on May 28, 1958, I caused to be mailed this motion with the attached papers to the Hon Oliver Gasch, Esq-US Atty at his address, US Court House, Wash D.C. via US Mail, postage prepaid.

I. WILLIAM STEMPIEL,
I. William Stempil,

501-13 St NW Wash DC

14

13

IN UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

(File Endorsement Omitted)

Misc. No. 1030

US D.C. Case Cr. #63-58

TRAVIT ROBINSON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

**Petition for Leave to Appeal, Time for Notice of Appeal Having
Expired—Filed May 29, 1958**

Comes now the petitioner, Travit Robinson, and prays this Honorable Court to grant this petition for leave to appeal, time for filing notice of appeal having expired, for the following reasons:

1:—At the day of sentencing, I advised my attorney that I was going to appeal the case (May 2, 1958) and he stated he would contact my relatives to see what they would do about the costs. I had told him that from other inmates at the District Jail that I knew I could appeal the judgment but did not file the necessary appeal paper, thinking that my attorney would do it, while I now understood he thought I would do it and then have him follow it up with the necessary papers. We misunderstood each other and I now find that I gave him the wrong impression as to what I wanted done and that he misunderstood what I was going to do or wanted to do. He advised me after the ten-day period, that he contacted my relatives in South Carolina and New Jersey without success and that we better file a petition to proceed in forma pauperis, never discussing the fact that neither one of us had taken the step to note the appeal properly. I now find it was not done but pray that I be allowed to file the notice of appeal time having expired, because my appeal has merit and a miscarriage of justice will remain uncontested on the records of justice if I am not permitted

to ask this Honorable Court for relief to right a wrong committed against me contrary to my Constitutional rights.

TRAVIT ROBINSON
Petitioner

14 Washington, D.C. ss:—Travit Robinson, being first duly sworn according to law on oath deposes and says that he is the petitioner in this action and that all of the information stated in the petition for leave to appeal, time for notice of appeal having expired, is true.

G. E. STOKES
Notary Public DC

My comm expires Oct. 31, 1960

(SEAL)

PROOF OF SERVICE

I, I. William Stempil, counsel for the petitioner, Travit Robinson do hereby certify that on May 28, 1958 I caused a copy of this petition to be mailed via US Mail, Postage paid, to the Hon Oliver Gasch, Esq. US Atty for the D of C at his address, US Ct House, Wash DC.

I. Wm. STEMPL,.
I. Wm. Stempil,
Counsel for Petitioner.

501-13 St NW
Wash, D.C.

15 UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

US DC Cr. # 63-58

TRAVIT ROBINSON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

Affidavit of Attorney for Petitioner

Comes now, I. William Stempil, counsel for the petitioner, Travit Robinson in Cr. 63-58, U.S. District Ct for

the District of Columbia, being duly sworn in accordance with law, under oath, deposes and says:

On the day (May 2, 1958) when Travis Robinson was sentenced by the Hon. Judge Curran to serve 4 to 12 years in a reformatory by reason of being found guilty of manslaughter by a jury on a date earlier, I advised the Court that it was my intention to appeal the judgment and on the way out of the Courtroom my client advised me that he was going to appeal the case, letting me know that at the District Jail he had already been advised by other inmates that he could appeal just by filing a paper (the notice of appeal). I was under the impression that he was going to do that without me since I told him at that time I was going to seek out his relatives to see what they could do to help with defraying the cost of the appeal. I did attempt to contact them by mail in South Carolina and by phone and mail to Newark, N.J. but without success.

In the meantime, since in my eleven years of practice before this Court and never having had the occasion to appeal Criminal action, I neglected to differentiate the rules as to appealing this type of a case and that of a civil case. As a result, despite the fact that I was under

16 the impression that I had thirty days within which to file the notice of appeal and further thinking that my client had already done that in light of the conversation had with me in the Courtroom on the day of sentencing, I concentrated on gathering material for the appeal and attempting to see that the case could go ahead in forma pauperis since my efforts to secure funds for said appeal were being met with failure.

Investigation around the District Court will prove that I made my intentions known as to the appeal, but never being given an inkling that I was operating incorrectly.

I am guilty of neglect in not going further into the Federal Rules of Criminal Procedure and only relying on the Federal Rules of Civil Procedure, and pray this Honorable Court not to punish me for this act of neglect which was an act not contemplated by me in view of how hard I worked on this case and how long I labored to secure justice for my client.

I pray that this Honorable Court grant my client leave to proceed with his appeal in order that justice may be

done and his Constitutional rights protected and note that my negligence was an act of excusable error and excusable neglect.

I swear that this affidavit is not made frivolously and only in the interest of seeing justice done.

I. WILLIAM STEMPIEL

I. William Stempel

Subscribed and sworn to before me this 28 day of May, 1958.

I certify that on May 28, 1958 I caused to be mailed a copy of this affidavit to the Hon Oliver C Gasch, Esq. US Atty at his address, US Court House, Wash DC via US Mail postage prepaid.

I. WILLIAM STEMPIEL

17 IN UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

(File Endorsement Omitted)

Misc. No. 1030

TRAVIS ROBINSON, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

**Opposition to Petition for Leave to Prosecute Appeal In
Forma Pauperis—Filed June 4, 1958**

Comes now respondent by its attorney, the United States Attorney, and opposes the instant petition for leave to prosecute appeal in forma pauperis on the ground that it is moot.

As reflected by the docket and files of the District Court in Criminal No. 63-58, petitioner's application for leave to proceed on appeal without prepayment of costs and his accompanying request that he be granted a transcript at Government expense were granted by the trial court

(Curran, J.) on May 28, 1958. A notice of appeal was filed by or on behalf of petitioner on that date. Since petitioner apparently seeks from this Court relief which already has been granted by the trial court, the petition should now be denied as moot.

/s/ OLIVER GASCH

United States Attorney.

/s/ CARL W. BELCHER

Assistant United States Attorney.

/s/ HAROLD D. RHYNE DANCE, JR.

Assistant United States Attorney.

CERTIFICATE OF SERVICE

(Omitted in printing)

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(File Endorsement Omitted)

APRIL TERM, 1958

No. Misc. 1030

TRAVIT ROBINSON, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

Before: Edgerton, Chief Judge, Madden, Judge of the Court of Claims, sitting by designation, and Fahy, Circuit Judge, in Chambers.

Order Dismissing as Moot the Petition for Leave to Appeal In Forma Pauperis and Dismissing the Motion for Leave to File an Affidavit and the Motion for Leave to Appeal—June 19, 1958

Upon consideration of the petition for leave to prosecute an appeal in forma pauperis, of respondent's opposition, and of petitioner's motion for leave to file an affidavit and of petitioner's motion for leave to appeal, time for notice of appeal having expired, it is

ORDERED by the court that the petition for leave to prosecute an appeal in forma pauperis be, and it is hereby dismissed as moot and that the motion for leave to file an affidavit and the motion for leave to appeal, time having expired, be, and they are hereby, dismissed.

Per Curiam.

Dated: June 19, 1958

21 Clerk's Certificate to foregoing transcript omitted in printing.

22 IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(File Endorsement Omitted)

No. 14,509

TRAVIT ROBINSON, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

No. 14,510

TROYIT ROBINSON, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Motion to Dismiss—Filed June 30, 1958

Comes now the United States by its attorney, the United States Attorney, and respectfully moves the Court to dismiss these appeals, for the reason this Court has no jurisdiction over them.

On April 2, 1958, appellants were convicted of manslaughter. Each was represented by retained counsel. Rule 33 of the Federal Rules of Criminal Procedure permits the filing of a motion for new trial on grounds other than newly discovered evidence within five days. Such a motion for new trial was filed seven days after conviction. The motion was not timely. *Pugh v. United States*, 197

F. 2d 509 (9th Cir. 1952). However, the trial court heard and denied the motion on April 17, 1958. Thereafter, appellants were sentenced on May 2, 1958, and the judgments and commitments were filed on May 7, 1958. On May 28, 1958, appellants' applications for leave to appeal in forma pauperis were filed in the District Court, granted, and notices of appeal were filed.

In this Court of Appeals each appellant moved to note their appeals time having expired. On June 19, 1958, this Court dismissed this motion. Misc. 1030. Rule 37(a) of the Federal Rules of Criminal Procedure provides in part as follows:

"An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from,"

23 These appeals were not noted until twenty-one days after entry of the judgment. Rule 45(b) of the Federal Rules of Criminal Procedure provides that "... the court may not enlarge the period . . . for taking an appeal." The filing of a timely notice of appeal is mandatory and jurisdictional. Accordingly, this Court lacks jurisdiction to entertain the appeals. *Swihart v. United States*, 169 F. 2d 808 (10th Cir. 1948); *United States v. Froehlich*, 166 F. 2d 85 (2nd Cir. 1948); *United States v. Bloom*, 164 F. 2d 556 (2nd Cir. 1947), *cert. denied*, 333 U.S. 857 (1948); *Marion v. United States*, 171 F. 2d 185 (9th Cir. 1948), *cert. denied*, 337 U.S. 944 (1948).

Wherefore, it is respectfully submitted that the appeals be dismissed.

/s/ OLIVER GASCH
United States Attorney

/s/ CARL W. BELCHER
Assistant United States Attorney

/s/ EDGAR T. BELLINGER
Assistant United States Attorney

CERTIFICATE OF SERVICE

(Omitted in printing)

25 Clerk's Certificate to foregoing paper omitted in printing.

26 IN UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT
(File Endorsement Omitted)

No. 14509

TROYIT ROBINSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 14510

TRAVIT ROBINSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

On Appellee's Motion to Dismiss

Opinion—Decided October 2, 1958

Mr. I. William Stempel entered an appearance for appellants.

Messrs. Oliver Gasch, United States Attorney, *Carl W. Belcher* and *Edgar T. Bellinger*, Assistant United States Attorneys, entered appearances for appellee.

Before WILBUR K. MILLER, BAZELON and BURGER, Circuit Judges.

27 BAZELON, *Circuit Judge*: Appellants were convicted of manslaughter and the judgments and commitments were filed on May 7, 1958. The District Court, on May 28, 1958 granted them leave to appeal in forma pauperis and notices of appeal were filed by their counsel that same day.

The cause is now before us on the Government's motion to dismiss the appeals for lack of jurisdiction. The Government argues that these notices of appeal were filed eleven days late and that the filing of a timely notice of appeal is mandatory and jurisdictional. It relies on the

provision of Rule 45(b), FED.R.CRIM.P., that "the court may not enlarge . . . the period for taking an appeal."

Rule 45(b) provides, with respect to acts required or allowed to be done at or within a specified time, that the District Court, for cause shown, may at any time in its discretion do one of two things:

(1) It may "order the period enlarged" if an application for such enlargement is made before expiration of the allowed time.

(2) If the party, as a result of excusable neglect, has failed to act within the allowed time, the court, upon motion, may "permit the act to be done after the expiration of the specified period"

The rule then states the provision the Government relies on here, namely, that "the court may not enlarge . . . the period for taking an appeal." This injunction upon the District Court applies to *enlargement of time*, the first of the two causes permitted by the rule. But it does not apply to the second alternative. In other words, the District Court has no authority to grant a greater period than ten days for taking an appeal. It may, however, if satisfied that the failure to note an appeal within ten days is excusable, permit late filing.

There is a sound reason why the District Court should be permitted on limited grounds to extend the time for appeal after its expiration, even though it may not do so before its expiration. There is ample justification in reason

28 for different treatment of pre-expiration and post-expiration applications. While it is, of course, desirable and contemplated that a party who intends to and is able to file a simple notice of appeal should do so within the time prescribed, there is a rational basis for exceptions in exceptional circumstances. If he can make a timely application for an extension of time, he can readily and with less effort file the notice of appeal itself. If, however, for some cause amounting legally to "excusable neglect" the party fails to take any action during the prescribed time, the rule seems plainly to allow the District Court discretion to permit him to file a late notice of appeal.

In the cases before us, it appears from the affidavit of appellants' trial counsel that he informed the court at the

sentencing that the appellants intended to appeal and that the only reason the appeals were not taken within ten days, as required by Rule 37(a), FED.R.CRIM.P., was that counsel, who had never taken a criminal appeal before, mistakenly assumed he had thirty days, as provided in Rule 73(a), FED.R.CIV.P.

If, on this showing, the District Court was satisfied that the failure to act within ten days was a result of excusable neglect, we have jurisdiction of the appeals. From the record before us we cannot tell whether or not the District Court intended its grant of the May 28 application as a determination of excusable neglect. We therefore remand the cases to the District Court for supplementation of the record as to whether that court intended its grant to serve as a finding that failure to act was due to excusable neglect under Rule 45(b), FED.R.CRIM.P.

So ordered.

WILBUR K. MILLER, *Circuit Judge*, dissenting: The concluding sentence of Rule 45(b) of the Federal Rules of Criminal Procedure contains this unequivocal statement: "but the court may not enlarge the period . . . for taking an appeal." I think this forbids the District Court either to enlarge the time for taking an appeal on application therefor made before the expiration of the appeal period, or to enlarge the period after its expiration for excusable neglect or on any other ground.

There is no reason apparent to me why the District Court should be permitted on any ground to extend the time for appeal after its expiration, when it may not do so before its expiration.

The time for taking an appeal is arbitrarily fixed by Rule 37(a) of the Criminal Rules and is jurisdictional; it may not be changed either by the parties or by the court. *United States v. Bloom*, 164 F. (2d) 556 (2nd Cir. 1947); *Richards v. United States*, 89 U. S. App. D. C. 354, 192 F. (2d) 602 (1951); *Lujan v. United States*, 204 F. (2d) 171 (10th Cir. 1953); *Wagner v. United States*, 220 F. (2d) 513 (4th Cir. 1955); *Braynard v. Joy Mfg. Co.*, 9 F. R. D. 625 (M. D. Ohio, Wilken, J., 1949).

Rule 6(b) of the Federal Rules of Civil Procedure also has to do with the enlargement of time in which an act is required or allowed to be done, and provides in two clauses

that the court may (1) order the period enlarged before the expiration of the period originally prescribed or as extended by a previous order, or (2) permit the act to be done after the expiration of the specified or extended period where failure to act was the result of excusable neglect. When adopted, Rule 6(b) of the Civil Rules, like Rule 45(b) of the Criminal Rules, expressly denied power to the court to "enlarge the period" for taking an appeal. Rule 6(b) was subsequently amended so that the phrase "extend the time" was substituted for "enlarge the period" in the limiting provision. It is noted by the Advisory Committee on Rules of Civil Procedure that this amendment was made because "extend the time" is "a more suitable expression and *relates more clearly to both clauses (1) and (2).*" (My emphasis.) See Notes of Advisory Committee on Rules, FED. R. CIV. P., Rule 6, 28 U. S. C. A. 235.

The Advisory Committee on Rules of Criminal Procedure notes that Rule 45 of the Criminal Rules "is in substance the same as Rule 6 of the Federal Rules of Civil Procedure." The Committee adds, "It seems desirable that matters covered by this rule should be regulated in the same manner for civil and criminal cases, in order to preclude the possibility of confusion." See Notes of Advisory Committee on Rules, FED. R. CRIM. P., Rule 45, 18 U. S. C. A. 504.

In my opinion the District Court has no power to grant these appeals out of time because of neglect of counsel, even if it should find the neglect excusable. It follows that we have no jurisdiction here.

Even if this were not so, I do not believe the failure of appellants' two employed attorneys¹ to file notices of appeal in time because they were ignorant of the Rule's requirement can be said to be excusable neglect, in view of the fact that the Federal Rules of Criminal Procedure have been in effect about twelve years. *Burke v. Canfield*, 72 App. D. C. 127, 111 F. (2d) 526 (1940); *Maghan v. Young*, 80 U. S. App. D. C. 395, 154 F. (2d) 13 (1946); *Christoffel v. United States*, 88 U. S. App. D. C. 1, 190 F. (2d) 585

¹ These lawyers, retained by the appellants, were present and active throughout the trial and also represent them on appeal.

(1950); *Sieb's Hatcheries v. Lindley*, 13 F. R. D. 113 (W. D. Ark. 1952); *Ohlinger v. United States*, 135 F. Supp. 40 (S. D. Idaho 1955); 1 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §216.

I would grant the appellee's motion to dismiss.

31 IN UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

September Term, 1958

District Court Criminal No. 63-58

(File Endorsement Omitted)

No. 14,509

TROYIT ROBINSON, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

No. 14,510

TRAVIT ROBINSON, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

Before: WILBUR K. MILLER, BAZELON and BURGER, Circuit
Judges, in Chambers.

**Order Remanding Cases and Holding in Abeyance the Motion
to Dismiss—October 2, 1958**

These cases came on for consideration on appellee's motion to dismiss and on the transcript of the record.

Upon consideration whereof it is ORDERED by the court that these cases be, and they are hereby, remanded to the District Court for further proceedings in conformity with the opinion entered today.

It is FURTHER ORDERED by the court that the motion to dismiss be held in abeyance pending further proceedings before the District Court.

Per Curiam.

Dated: October 2, 1958

Circuit Judge Miller dissents.

IN UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

September Term, 1958
(File Endorsement Omitted)

No. 14,509

TROYIT ROBINSON, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

No. 14,510

TRAVIT ROBINSON, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

Before: PRETTYMAN, *Chief Judge*, EDGERTON, WILBUR K.
MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN
and BURGER, *Circuit Judges*, in Chambers.

**Order Denying Petition for Rehearing in Banc—
November 5, 1958**

Upon consideration of appellee's petition for a rehearing
in banc, it is

ORDERED by the court that the aforesaid petition is denied.

Per Curiam.

Dated: November 5, 1958

Circuit Judges Wilbur K. Miller and Bastian would grant
the petition for rehearing in banc.

35 Clerk's Certificate to foregoing transcript omitted
in printing.

36 IN UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

(File Endorsement Omitted)

Criminal No. 63-58

UNITED STATES

v.

TROYIT ROBINSON and TRAVIT ROBINSON

Order—Filed October 8, 1958

These cases having been remanded to this Court by the United States Court of Appeals for the District of Columbia Circuit for supplementation of the record, it is by the Court this 8th day of October, 1958

ORDERED that the record reflect that the appeals were allowed and failure to act was due to excusable neglect under Rule 45(b) of the Federal Rules of Criminal Procedure.

EDWARD M. CURRIAN
Judge

CERTIFICATE OF SERVICE

I hereby certify that on October 8th, 1958 I served a copy of this Order on the United States Attorney at his office in the United States Court House, Washington, D.C.

I. WILLIAM STEMPIEL
I. William Stempel
Warner Building
Washington, D.C.

28

37 Clerk's Certificate to foregoing paper omitted in
printing.

38

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 558

UNITED STATES, *Petitioner*,

v.

TROYIT ROBINSON ET AL.

Order Allowing Certiorari—January 19, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

BIEFS

PETITION FOR

A WRIT OF

CERTIORARI

FILE COPY

U.S. Supreme Court, U.S.
FILED
1954
100-100000-100

FILE NO. 100-100000-100

In the Supreme Court of the United States

COMING FROM THE

UNITED STATES OF AMERICA, PETITIONER

THOMAS HARRISON AND THOMAS HARRISON

PRISONER FOR A TERM OF YEARS, PETITIONER, OF THE
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, DISTRICT

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

TROYIT ROBINSON AND TRAVIT ROBINSON

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit remanding the cases of respondents to the District Court for a determination as to whether there was a finding that the failure to file timely notices of appeal was due to excusable neglect.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (Appendix, pp. 9-13, *infra*) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 2, 1958 (p. 14, *infra*). A petition for a rehearing *en banc* was denied on November 5, 1958

(p. 15, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a court, acting pursuant to Rule 45 (b) of the Federal Rules of Criminal Procedure, may upon a showing of excusable neglect permit the filing of a notice of appeal in a criminal case after the expiration of the time prescribed in Rule 37 (a) (2).

RULES INVOLVED

Rule 37 (a) (2) of the Federal Rules of Criminal Procedure provides in pertinent part:

Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. * * *

Rule 45 (b) of the Federal Rules of Criminal Procedure provides:

Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not en-

large the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.

STATEMENT

Petitioners, who were represented by retained counsel, were convicted of manslaughter in the United States District Court for the District of Columbia. On May 2, 1958, they were orally sentenced in court. On May 7, 1958, judgment and commitment papers were filed. Twenty-one days later, or May 28, petitioners applied to the District Court for leave to proceed on appeal *in forma pauperis*, leave was granted, and notices of appeal filed by their counsel that same day (R. I-4).

On the following day, May 29, 1958, counsel for petitioner Travis Robinson filed in the Court of Appeals a petition for "leave to appeal, time for notice of appeal having expired", a petition for leave to prosecute the appeal *in forma pauperis*, and a motion for leave to file an affidavit. Counsel indicated in his affidavit filed therewith: "I neglected to differentiate the rules as to appealing this type of a case and that of a civil case"; both counsel and petitioner stated that each thought the other would file a timely notice of appeal with the clerk of the District Court (R. II-1-8).

The government moved to dismiss the appeal for lack of jurisdiction (R. III-55). The Court of Appeals, however, on October 2, 1958, remanded the cases for a determination as to whether the action of the District Court in granting the May 28 leave

to appeal *in forma pauperis* constituted a finding that failure to file a timely notice of appeal was due to excusable neglect under Rule 45 (b) of the Criminal Rules (p. 14, *infra*). The majority of the Court of Appeals reasoned that, if such was the case, it would have jurisdiction of the appeals. It held that the injunction of Rule 45 (b) that "the court may not enlarge * * * the period for taking an appeal" applied to an *enlargement of time* beyond the ten day period fixed by Rule 37 (a) (2) where an application was made *before* the expiration of the allowable time, but not to the situation where, for an excusable reason, no action at all was taken during the allowable period (p. 10, *infra*). Circuit Judge Miller, dissenting, believed that Rule 45 (b) unequivocally forbids the District Court from extending the time for appeal either before or after the expiration of the prescribed period, that the Court of Appeals therefore had no jurisdiction, and in any event, there was no excusable neglect (pp. 11-13, *infra*). After the original decision of the Court of Appeals and before denial of the petition for rehearing, the District Court ruled that there was excusable neglect (p. 16, *infra*).

REASONS FOR GRANTING THE WRIT

The ruling of the court below is in conflict with decisions in numerous other circuits on a question of general federal law, which has constant and continuing importance. It is contrary to the plain meaning of the Criminal Rules—as they now stand—and frus-

trates the purpose of the rules to provide prompt disposition of criminal cases.

1. The decision below is in direct conflict with numerous decisions holding that, because the time limitation for taking an appeal is jurisdictional, the appellate court has no power to hear an appeal where notice is not timely filed.¹ See *United States v. Isabella*, 251 F. 2d 223 (C. A. 2); *United States v. Bloom*, 164 F. 2d 556 (C. A. 2), certiorari denied, 333 U. S. 857; *United States v. Scarlata*, 214 F. 2d 807 (C. A. 3); *Wagner v. United States*, 220 F. 2d 513 (C. A. 4); *Brant v. United States*, 210 F. 2d 470 (C. A. 5); *Huff v. United States*, 192 F. 2d 911 (C. A. 5), certiorari denied, 342 U. S. 946; *Burr v. United States*, 86 F. 2d 502 (C. A. 7), certiorari denied, 300 U. S. 664; *Banks v. United States*, 240 F. 2d 302 (C. A. 9); *Marion v. United States*, 171 F. 2d 185 (C. A. 9), certiorari denied, 337 U. S. 944; *Lujan v. United States*, 204 F. 2d 171 (C. A. 10); *Swihart v. United States*, 169 F. 2d 808 (C. A. 10).

In the recent *Isabella* case, for example, the Second Circuit held that it had no jurisdiction of an appeal

¹ Courts have departed from the strict rule of formal compliance only in exceptional circumstances as when a defendant being incarcerated without counsel has had no notice of the judgment which commences the running of the ten day period. See *Wallace v. United States*, 174 F. 2d 112 (C. A. 8), certiorari denied, 337 U. S. 947. For example, it has been held that the period begins to run only upon the receipt of the notice required by Rule 49 (c) (*Oddo v. United States*, 171 F. 2d 854 (C. A. 2)), or that an application to appeal *in forma pauperis* made at the time of sentencing would meet the requirements of notice. *Blunt v. United States*, 244 F. 2d 355 (C. A. D. C.).

filed on a Monday, when the ten day period fixed by Rule 37 (a) (2) had expired the previous Saturday, even though the delay was due to the neglect of the defendant's attorney who had orally stated at the time of sentencing that he would appeal. The court dismissed the appeal for lack of power to consider it, saying (251 F. 2d at p. 225) "if this Court had discretion in the matter we might well exercise it in favor of the prisoner".

2. Rule 45 (b) of the Criminal Rules, while authorizing a court to (1) enlarge the period of time during which an act is required to be done upon application made during the prescribed period, and (2) after the prescribed period, to permit the act to be done upon a showing of excusable neglect, specifically goes on to provide "but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal." This latter clause is a clear limitation on the power which the rule grants in its entirety. Its plain meaning is that under no circumstances at any time may the court extend the time limitations beyond the periods provided in the specified rules (Rules 33, 34, and 35) and also the time fixed for appeal by Rule 37 (a) (2).

In holding that this injunction with regard to the taking of an appeal applies only to the first clause of Rule 45 (b) but not the second clause, the court below has distorted the meaning of the provision. Both clauses have to do with *enlargement* as evidenced by the title of the paragraph, *supra*, p. 2. It is the allowable period of time which is enlarged. Whenever the

• court extends this time by granting permission to file out of time, whether such permission be granted before or after the expiration of the allowable time, it has enlarged the period.

3. The decision below is contrary to the spirit reflected in the holding of this Court in *United States v. Smith*, 331 U. S. 469. In that case it was argued that the five-day limitation on the making of a motion for a new trial, under Rule 33 of the Criminal Rules, did not limit the power of the district court to later grant the motion *sua sponte* even after the affirmance of the judgment of conviction upon an appeal in which the district court's previous denial of a new trial was one of the errors assigned. This Court rejected this contention, pointing out, *inter alia*, that the rules, in abolishing the limitation based on the court term, did not substitute indefiniteness, but prescribed precise times within which the power of a court must be confined.²

4. The question is one of great importance in the administration of criminal justice. The numerous decisions on the subject, only some of which have been cited, indicate that a claim of excusable neglect in failing to file a timely notice of appeal is one frequently asserted. In the District of Columbia itself, the Court of Appeals has already, in the short time which has elapsed since the decision below, entered at least two orders similar to that entered in this case. In addition, the reasoning applied by the court

² Rule 33, relating to new trials, stands on a par with Rule 37 (a) (2), with respect to the present problem (see *supra*, pp. 2-3).

below will affect the timeliness of motions for a new trial, arrest of judgment, and reduction of sentence under Rules 33, 34 and 35 of the Criminal Rules. Such a result is contrary to the purpose of the rules, manifest from the short, definite time limitations fixed for post-conviction motions and appeals, to expedite the consideration of criminal cases after conviction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA COOPER,
Attorneys.

DECEMBER 1958.

APPENDIX

United States Court of Appeals for the District of
Columbia Circuit

No. 14509

TROYIT ROBINSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 14510

TRAVIT ROBINSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPELLEE'S MOTION TO DISMISS

Decided October 2, 1958

Mr. I. William Stempel entered an appearance for appellants.

Messrs. Oliver Gasch, United States Attorney, Carl W. Belcher and Edgar T. Bellinger, Assistant United States Attorneys, entered appearances for appellee.

Before WILBUR K. MILLER, BAZELON, and BURGER,
Circuit Judges.

BAZELON, *Circuit Judge*: Appellants were convicted of manslaughter and the judgments and commitments were filed on May 7, 1958. The District Court, on May 28, 1958, granted them leave to appeal in forma pauperis and notices of appeal were filed by their counsel that same day.

The cause is now before us on the Government's motion to dismiss the appeals for lack of jurisdiction. The Government argues that these notices of appeal were filed eleven days late and that the filing of a timely notice of appeal is mandatory and jurisdictional. It relies on the provision of Rule 45 (b), Fed. R. Crim. P., that "the court may not enlarge * * * the period for taking an appeal."

Rule 45 (b) provides, with respect to acts required or allowed to be done at or within a specified time, that the District Court, for cause shown, may at any time in its discretion do one of two things:

(1) It may "order the period enlarged" if an application for such enlargement is made before expiration of the allowed time.

(2) If the party, as a result of excusable neglect, has failed to act within the allowed time, the court, upon motion, may "permit the act to be done after the expiration of the specified period. * * *"

The rule then states the provision the Government relies on here, namely, that "the court may not enlarge * * * the period for taking an appeal." This injunction upon the District Court applies to *enlargement of time*, the first of the two causes permitted by the rule. But it does not apply to the second alternative. In other words, the District Court has no authority to grant a greater period than ten days for taking an appeal. It may, however, if satisfied that the failure to note an appeal within ten days is excusable, permit late filing.

There is a sound reason why the District Court should be permitted on limited grounds to extend the time for appeal after its expiration, even though it may not do so before its expiration. There is ample justification in reason for different treatment of pre-expiration and post-expiration applications.

While it is, of course, desirable and contemplated that a party who intends to and is able to file a simple notice of appeal should do so within the time prescribed, there is a rational basis for exceptions in exceptional circumstances. If he can make a timely application for an extension of time, he can readily and with less effort file the notice of appeal itself. If, however, for some cause amounting legally to "excusable neglect" the party fails to take any action during the prescribed time, the rule seems plainly to allow the District Court discretion to permit him to file a late notice of appeal.

In the cases before us, it appears from the affidavit of appellants' trial counsel that he informed the court at the sentencing that the appellants intended to appeal and that the only reason the appeals were not taken within ten days, as required by Rule 37 (a), Fed. R. Crim. P., was that counsel, who had never taken a criminal appeal before, mistakenly assumed he had thirty days, as provided in Rule 73 (a), Fed. R. Civ. P.

If, on this showing, the District Court was satisfied that the failure to act within ten days was a result of excusable neglect, we have jurisdiction of the appeals. From the record before us we cannot tell whether or not the District Court intended its grant of the May 28 application as a determination of excusable neglect. We therefore remand the cases to the District Court for supplementation of the record as to whether that court intended its grant to serve as a finding that failure to act was due to excusable neglect under Rule 45 (b), Fed. R. Crim. P.

So ordered.

WILBUR K. MILLER, *Circuit Judge*, dissenting: The concluding sentence of Rule 45 (b) of the Federal Rules of Criminal Procedure contains this unequivocal

cal statement: "but the court may not enlarge the period * * * for taking an appeal." I think this forbids the District Court either to enlarge the time for taking an appeal on application therefor made before the expiration of the appeal period, or to enlarge the period after its expiration for excusable neglect or on any other ground.

There is no reason apparent to me why the District Court should be permitted on any ground to extend the time for appeal after its expiration, when it may not do so before its expiration.

The time for taking an appeal is arbitrarily fixed by Rule 37 (a) of the Criminal Rules and is jurisdictional; it may not be changed either by the parties or by the court. *United States v. Bloom*, 164 F. (2d) 556 (2nd Cir. 1947); *Richards v. United States*, 89 U. S. App. D. C. 354, 192 F. (2d) 602 (1951); *Lujan v. United States*, 204 F. (2d) 171 (10th Cir. 1953); *Wagner v. United States*, 220 F. (2d) 513 (4th Cir. 1955); *Brainard v. Joy Mfg. Co.*, 9 F. R. D. 625 (M. D. Ohio, Wilken, J., 1949).

Rule 6 (b) of the Federal Rules of Civil Procedure also has to do with the enlargement of time in which an act is required or allowed to be done, and provides in two clauses that the court may (1) order the period enlarged before the expiration of the period originally prescribed or as extended by a previous order, or (2) permit the act to be done after the expiration of the specified or extended period where failure to act was the result of excusable neglect. When adopted, Rule 6 (b) of the Civil Rules, like Rule 45 (b) of the Criminal Rules, expressly denied power to the court to "enlarge the period" for taking an appeal. Rule 6 (b) was subsequently amended so that the phrase "extend the time" was substituted for "enlarge the period" in the limiting provision. It is noted by the

Advisory Committee on Rules of Civil Procedure that this amendment was made because "extend the time" is "a more suitable expression and *relates more clearly to both clauses (1) and (2).*" [My emphasis.] See Notes of Advisory Committee on Rules, Fed. R. Civ. P., Rule 6, 28 U. S. C. A. 235.

The Advisory Committee on Rules of Criminal Procedure notes that Rule 45 of the Criminal Rules "is in substance the same as Rule 6 of the Federal Rules of Civil Procedure." The Committee adds, "It seems desirable that matters covered by this rule should be regulated in the same manner for civil and criminal cases, in order to preclude the possibility of confusion." See Notes of Advisory Committee on Rules, Fed. R. Crim. P., Rule 45, 18 U. S. C. A. 504.

In my opinion the District Court has no power to grant these appeals out of time because of neglect of counsel, even if it should find the neglect excusable. It follows that we have no jurisdiction here.

Even if this were not so, I do not believe the failure of appellants' two employed attorneys¹ to file notices of appeal in time because they were ignorant of the Rule's requirement can be said to be excusable neglect, in view of the fact that the Federal Rules of Criminal Procedure have been in effect about twelve years. *Burke v. Canfield*, 72 App. D. C. 127, 111 F. (2d) 526 (1940); *Maghan v. Young*, 80 U. S. App. D. C. 395, 154 F. (2d) 13 (1946); *Christoffel v. United States*, 88 U. S. App. D. C. 1, 190 F. (2d) 585 (1950); *Sieb's Hatcheries v. Lindley*, 13 F. R. D. 113 (W. D. Ark. 1952); *Ohlinger v. United States*, 135 F. Supp. 40 (S. D. Idaho 1955); 1 Barron and Holtzoff, Federal Practice and Procedure § 216.

I would grant the appellee's motion to dismiss.

¹ These lawyers, retained by the appellants, were present and active throughout the trial, and also represent them on appeal.

United States Court of Appeals for the District of
Columbia Circuit

SEPTEMBER TERM, 1958

District Court Criminal No. 63-58

No. 14,509

TROYIT ROBINSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 14,510

TRAVIT ROBINSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Before WILBUR K. MILLER, BAZELON and BURGER,
Circuit Judges, in Chambers

Order

These cases came on for consideration on appellee's motion to dismiss and on the transcript of the record.

Upon consideration whereof it is ORDERED by the court that these cases be, and they are hereby, remanded to the District Court for further proceedings in conformity with the opinion entered today.

It is further ordered by the court that the motion to dismiss be held in abeyance pending further proceedings before the District Court.

PER CURIAM.

Dated: October 2, 1958.

Circuit Judge Miller dissents.

United States Court of Appeals for the District of
Columbia Circuit

SEPTEMBER TERM, 1958

No. 14,509

TROYIT ROBINSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 14,510

TRAVIT ROBINSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Before PRETTYMAN, Chief Judge, EDGERTON, WILBUR
K. MILLER, BAZELON, FAHY, WASHINGTON, DANA-
HER, BASTIAN and BURGER, Circuit Judges, in Cham-
bers

Order

Upon consideration of appellee's petition for a
rehearing in banc, it is

Ordered by the court that the aforesaid petition
is denied.

PER CURIAM.

Dated: November 5, 1958.

Circuit Judges Wilbur K. Miller and Bastian would
grant the petition for rehearing in banc.

United States District Court for the District of
Columbia

Criminal No. 63-58

UNITED STATES

v.

TROYIT ROBINSON AND TRAVIT ROBINSON

Order

These cases having been remanded to this Court by the United States Court of Appeals for the District of Columbia Circuit for supplementation of the record, it is by the Court this 8th day of October, 1958

ORDERED that the record reflect that the appeals were allowed and failure to act was due to excusable neglect under Rule 45 (b) of the Federal Rules of Criminal Procedure.

/s/ EDWARD M. CURRAN, Judge.

Certificate of Service

I hereby certify that on October 8th, 1958 I served a copy of this Order on the United States Attorney at his office in the United States Court House, Washington, D. C.

I. WILLIAM STEMPIL,
Warner Building, Washington, D. C.

~~SECRET~~
BRIEF FOR

THE

UNITED

STATES

FILE COPY

Office Supreme Court, U.S.

FILED

JUL 13 1959

JAMES R. MOWING, Clerk

No. 16

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

TROYT ROBINSON AND TRAVET ROBINSON

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,

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MALCOLM R. WILKEY,

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 16

UNITED STATES OF AMERICA, PETITIONER

v.

TROYIT ROBINSON AND TRAVIT ROBINSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 21-25) are reported in 260 F. 2d 718.

JURISDICTION

The opinion of the Court of Appeals was rendered October 2, 1958 (R. 21). A petition for rehearing *en banc* was denied November 5, 1958 (R. 26). The petition for a writ of certiorari was filed December 4, 1958 and was granted January 19, 1959 (R. 28). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a court, acting pursuant to Rule 45(b) of the Federal Rules of Criminal Procedure, may upon

a showing of excusable neglect permit the filing of a notice of appeal in a criminal case after the expiration of the time prescribed in Rule 37(a)(2).

RULES AND STATUTES INVOLVED

Rule 37(a)(2) of the Federal Rules of Criminal Procedure provides in pertinent part:

Time for Taking Appeal.—An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. * * *

Rule 45(b) of the Federal Rules of Criminal Procedure provides:

Enlargement.—When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under

Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.

18 U.S.C. 3771, 3772, and pertinent provisions of the Federal Rules of Criminal and Civil Procedure, are set forth in the Appendix, *infra*, pp. 32-37.

STATEMENT

Respondents were convicted of manslaughter and were each sentenced to prison for a term of four to twelve years (R. 1, 2, 5, 6). Respondents retained two attorneys who represented them throughout the trial and on appeal (R. 19, dissenting opinion R. 24).

The jury returned the verdicts of guilty on April 2, 1958 (R. 1, 5). Respondents were sentenced on May 2, 1958 (R. 1, 2, 5, 6). The judgments against Troyit Robinson and Travit Robinson were entered, respectively, on May 2, 1958 and May 7, 1958 (R. 1, 5), and both judgments were marked filed on May 7, 1958 (R. 2, 6). On May 28, 1958, similar notices of appeal for each respondent were filed in the district court (R. 3, 7), and respondents were allowed to proceed without prepayment of costs (R. 4, 8-9).

On May 29, 1958, respondent Travit Robinson filed in the Court of Appeals a motion for leave to file a petition to prosecute in *forma pauperis* and a petition for leave to appeal after time for notice of appeal had expired (R. 9-17). In affidavits supporting these petitions, both Travit Robinson and his counsel claimed they were under the impression that the other would file the notice of appeal (R. 10, 16). His attorney also claimed that " * * * since in my eleven

years of practice before this Court and never having had the occasion to appeal Criminal action, I neglected to differentiate the rules as to appealing this type of a case and that of a civil case" (R. 16).

On June 4, 1958, the government filed its opposition to the petition for leave to proceed in *forma pauperis* in the Court of Appeals, pointing out that this had previously been granted by the district judge and therefore that the petition was moot (R. 17-18). On June 19, 1958, the Court of Appeals, in a *per curiam* order, dismissed the petition to proceed in *forma pauperis* as moot, and, since time to appeal had expired, dismissed the motion for leave to appeal (R. 18-19).

The government moved, on June 30, 1958, to dismiss the appeals of both respondents, claiming that the filing of a timely notice of appeal was mandatory and jurisdictional (R. 19-20). On October 2, 1958, the Court of Appeals, in a divided opinion, remanded the cases to the district court for determination of whether that court intended its grant to proceed in *forma pauperis* "as a finding that failure to act was due to excusable neglect under Rule 45(b)" (R. 23). The majority of the court held that if "the District Court was satisfied that the failure to act within ten days was a result of excusable neglect, we have jurisdiction of the appeals" (R. 23). The dissenting judge felt that the conclusion of Rule 45(b)—"but the court may not enlarge the period * * * for taking an appeal"—forbids enlargement of time under any circumstances (R. 23). Furthermore, he stated that "I do not believe the failure of appellants' two em-

ployed attorneys to file notices of appeal in time because they were ignorant of the Rule's requirement can be said to be excusable neglect" (R. 24).

Upon remand, the district judge on October 8, 1958, entered an order to the effect that the "failure to act was due to excusable neglect under Rule 45(b)" (R. 27). The government petitioned for a rehearing by the Court of Appeals *en banc*, which was denied on November 5, 1958, two judges noting that they would grant the petition for rehearing (R. 26).

SUMMARY OF ARGUMENT

Respondents admittedly sought to note an untimely appeal after the 10 days provided by Rule 37(a)(2) of the Federal Rules of Criminal Procedure. The Court of Appeals held that an untimely appeal could be allowed by the district court after the lapse of the 10-day period, upon a showing of excusable neglect under Rule 45(b).¹ Such a ruling is without precedent. It violates the clear wording and intent of the Rules, and constitutes a change in the Rules by decision, rather than by the normal rule-making process.

I

Rule 45(b) expressly provides that the court may not enlarge the time for taking an appeal. The majority below held that this prevented enlarging the appeal time during the allowable 10-day period but did not prevent a court from permitting an untimely notice of appeal to be filed where there was excusable

¹ All references to Rules are to the Federal Rules of Criminal Procedure, unless otherwise indicated.

neglect. This interpretation is neither logical nor consistent with the Rules as a whole.

A. Subsection (b) of Rule 45 is entitled "Enlargement". Its concluding clause prohibits enlargement of "the period for taking an appeal". On its face this provision pertains to enlargement both before and after the specified time period. Otherwise, under the construction below, the district court is absolutely forbidden to enlarge the appeal time during the 10-day period, but has the power anytime thereafter to grant an untimely appeal upon a showing of excusable neglect. This is plainly anomalous. Furthermore, it amounts to a petition for allowance of an appeal, which was abolished by Rule 37(a)(1).

B. Rule 45(b), in addition to prohibiting enlargement of the appeal time, likewise restricts enlargement of the period for action under Rules 33, 34, and 35, except as otherwise provided in those Rules. The interpretation below—that the term "enlargement" prevents only extension *during* the period specified in the Rules, but not otherwise—renders this provision meaningless. Both Rule 33, on motions for new trials, and Rule 34, as to an arrest of judgment, contain specific provisions for enlarging the time prior to expiration of the specified period. Therefore, the proscription against enlargement in Rule 45 must refer to enlargement *after* the period. Moreover, this Court has directly rejected any such lingering power in connection with Rule 33. *United States v. Smith*, 331 U.S. 469.

C. Rule 2 provides the standards for construing the Criminal Rules. These include securing simplicity in

procedure, fairness in administration, and elimination of delay. To allow an appeal at any time, on a showing of excusable neglect, is not within the spirit or standards for interpreting the Rules. It clearly cannot eliminate delay. To the contrary, such an interpretation would permit delay and could result in appeals months or even years after the appeal time had expired.

II.

The time for notice of appeal was fixed by Rule 37(a)(2) at 10 days, and there was to be no extension granted regardless of excuse. The background and previous consistent construction of the Rules indicate that this could not be changed by discretionary action in the district court.

A. The right of appeal in criminal cases is relatively recent. And when the first Criminal Rules were promulgated by this Court in 1934, one of the express purposes of providing such rules was to eliminate the long delays after verdict. Accordingly, the time period for notice of appeal was very short—5 days—and the Rule was consistently interpreted to be mandatory and jurisdictional. There was no Rule permitting enlargement.

B. The present Federal Rules of Criminal Procedure were prepared with the aid of an advisory committee which deliberately eliminated a preliminary draft provision for a limited extension of time for filing the notice of appeal. The committee, in drafting the Rules, and this Court, in promulgating them, were aware of the previous uniform interpretation that a timely notice of appeal was mandatory and jurisdictional. The

committee was also aware that in England the time to appeal could be extended. Further, since the new criminal Rule on enlargement was meant to accomplish the same ends as its civil counterpart, the gloss of the uniform civil requirement of a timely notice of appeal as jurisdictional was before the committee. In addition to this background, plainly showing the intent of the Rules, it should be noted that not one of the many commentators make any suggestion in accord with the interpretation of the court below. To the contrary, all available data indicate that the aim of the Rules was that the time limit for appeal could not be altered.

C. A large number of cases, since the present criminal appeal Rule became effective, have uniformly dismissed untimely appeals regardless of the merits of the case or the excuse. This unanimity of judicial opinion suggests that the Rules are not subject to the strained interpretation attempted below. Once the time for appeal has expired, no district court retains power to grant an untimely appeal.

III

The opinion below is, we submit, an attempt to change the criminal appeal Rule promulgated by this Court. If there is to be such a change in policy, we believe that it should be by the appropriate use of the rule-making power and not by judicial decision. *United States v. Isthmian Steamship Co.*, 359 U.S. 314. A limited provision for relief could be fixed by Rule, but this is not the effect of the decision below. Instead, it leaves the appeal time completely unlimited where excusable neglect can be shown.

ARGUMENT

Respondents' appeals are admittedly untimely under Rule 37(a)(2) requiring that appeal be taken within 10 days after judgment. The Court of Appeals for the District of Columbia Circuit has held, however, that, under Rule 45(b), the district court could permit an untimely appeal to be taken upon a showing of excusable neglect. This ruling, lacking the support of any authority and contrary to numerous decisions, violates the plain language and manifest aim of the Rules. It represents, we submit, a change in the Rules by judicial decision, rather than by the normal rule-making process.

I. The Federal Rules of Criminal Procedure on their face prohibit an untimely appeal

Rule 45(b) of the Federal Rules of Criminal Procedure provides:

Enlargement.—When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; *but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.* [Emphasis added.]

The majority of the court below held that the concluding limitation in this Rule proscribes enlargement of the time under subpart (1), *i.e.*, prior to the expiration of the period fixed by the Rules, but does not prohibit permission to take action under subpart (2), *i.e.*, after the period has entirely run. The court reasoned that the Rule uses the words "order the period enlarged" in the first situation, but uses "permit the act to be done after the expiration of the specified period" in the second situation. On this basis, the court found that the limitation against "enlargement" applies only to the first case, not to permission to act after the period fixed by the Rules—in this case, the 10-day period fixed by Rule 37(a)(2)—has expired. In our view, this is neither a logical interpretation nor one consistent with the structure of the Rules as a whole.

A. The construction of Rule 45(b) by the court below distorts its language

All of subsection (b) of Rule 45 is entitled "Enlargement". The drafters of the Rule, and this Court in promulgating the Rule, did not use a meaningless term in the title. The Rule deals with the "enlargement" of the permissible period of time for taking action, and whenever a court grants permission to take action beyond the time fixed by the Rules—whether it be granted before or after the period fixed—there is an "enlargement" of time. Hence, when Rule 45(b) flatly prohibits the court from enlarging the period for taking an appeal, it necessarily means that the time for taking an appeal shall not be enlarged, either before or after the 10-day period.

Under the construction given Rule 45(b) by the court below, the district court, after the 10-day period for taking an appeal, can do what it is admittedly forbidden to do during the 10-day period. This is incongruous on its face. Moreover, this construction has the further effect of granting to the district court the exclusive power to confer untimely jurisdiction upon a court of appeals. Authorization to reach this anomalous result is found, not in the Rule for taking appeals, but only by virtue of a "round-about" interpretation of Rule 45(b). Certainly, if it had been intended to lodge such a power in the district court, it would have been much simpler to provide it directly in Rule 37. But this authority is not expressed in Rule 37(a)(1). To the contrary, "[p]etitions for allowance of appeal * * * in cases governed by these rules are abolished". Rule 37(a)(1) and old Rule III, 292 U.S. 662. The interpretation of Rule 45(b) suggested by the court below in effect restores the petition for allowance of appeal by permitting a district court to decide whether an untimely appeal should be allowed.

B. The construction of the court below renders meaningless the similar limitation as to Rules 33, 34, and 35

In addition to prohibiting enlargement of the time for taking an appeal, Rule 45(b) provides:

* * * the court may not enlarge the period for taking any action under Rules 33, 34, and 35, except as otherwise provided in those rules, * * *.

To be consistent, the District of Columbia Circuit's interpretation of Rule 45(b) on enlarging the appeal

period must apply with the same force and effect to Rules 33, 34, and 35. But the scheme of the Rules and the decisions of this Court conclusively dictate otherwise.

1. Rule 33 (App., *infra*, p. 34) sets out the procedure for a new trial. It provides two time limitations. The first states that a motion for new trial based on newly discovered evidence "may be made only before or within two years after final judgment * * *." If evidence is newly discovered after two years it could amount to "excusable neglect" and, under the reasoning of the court below, a new trial could then be granted at any time *after* two years. This makes meaningless the time limit which this Court itself inserted in the final promulgation of the rules.²

The second time limitation on granting a new trial under Rule 33 provides:

A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further

² The advisory committee had recommended that a motion for a new trial on newly discovered evidence be permitted at any time. See Federal Rules of Criminal Procedure, Preliminary Draft, with Notes and Forms, Prepared by the Advisory Committee on Rules of Criminal Procedure, United States Government Printing Office, 1943, Rule No. 31(c), p. 134; Federal Rules of Criminal Procedure, Second Preliminary Draft, With Notes and Forms, Prepared by the Advisory Committee on Rules of Criminal Procedure, United States Government Printing Office, February 1944, Rule No. 35, p. 129; Federal Rules of Criminal Procedure, with Notes and Institute Proceedings, New York University School of Law Institute—Proceedings, Vol. VI, 1946, pp. 206, 230.

time as the court may fix during the 5-day period.

The interpretation of Rule 45(b) made by the court below, as applied to this part of Rule 33, renders even the mention of Rule 33 in the limiting clause of Rule 45(b) nugatory. Pre-expiration enlargement is specifically sanctioned in Rule 33 itself. Hence, there is no warrant for reading the term "enlarge" in the last part of Rule 45(b) as applying only to enlargement within the period fixed by the Rules. Moreover, if enlargement may be obtained both before and after the 5 days, the whole of the enlargement authority of Rule 45(b) would be applicable to Rule 33. But if that were so, the language of Rule 45(b) providing " * * * but the Court may not enlarge the period for taking any action under Rule * * * 33 * * * except as otherwise provided in [that] rule * * *" would become meaningless surplusage.³

This Court has held that no such interpretation of Rule 33 is permissible. In *United States v. Smith*, 331 U.S. 469, a unanimous opinion made it clear that the power of the trial court *sua sponte* to grant a new trial under Rule 33 was limited by the time set in the Rule. In that case, as here, the claim was made "that because the literal language of the Rule places the five-day limit only on the making of the motion, it does not limit the power of the court later to grant the motion * * *." 331 U.S. at 473. This Court

³ Such an interpretation could also render Rule 37(a)(2) confusing and unlimited, since it provides for an appeal "within 10 days after entry of the order denying the motion" for a new trial.

rejected any such power which "lingers on indefinitely", 331 U.S. at 474, pointing out that the Rules, in abolishing the limitation based on the court term, did not substitute indefiniteness, but prescribed precise times within which the power of a court must be confined. See also *Marion v. United States*, 171 F. 2d 185 (C.A. 9), certiorari denied, 337 U.S. 944, where the Court of Appeals expressly denied the power of a trial court even to rule upon an untimely motion under Rule 33 because of the limitation in Rule 45(b), and *Drown v. United States*, 198 F. 2d 999 (C.A. 9), certiorari denied, 344 U.S. 920, where the court declined to reverse the trial court's refusal to grant permission to file untimely motions under Rules 33 and 34.

2. The suggested interpretation of Rule 45(b) is likewise incompatible with Rule 34 (App., *infra*, p. 34). The procedure to obtain an arrest of judgment is contained in Rule 34 with the following time limitation:

The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period.

Here again, since Rule 34 has a specific provision for extension before termination of the 5-day period, the prohibition against enlargement in Rule 45(b) cannot refer to enlargement of the fixed time before its expiration. It must mean that, if the fixed time has expired without an extension having been obtained, the motion cannot be entertained.

3. The third Rule mentioned in Rule 45(b) in which the time may not be enlarged is Rule 35 (App.,

infra, p. 34). This contains a time restriction of 60 days within which the court may reduce the sentence. This is to be contrasted with the provision for correction of an illegal sentence at any time, contained in the same Rule. The purpose of the 60-day provision was to substitute a fixed period for the term-of-court limitation, which had theretofore marked the time within which a sentence could be reduced. See Notes of Advisory Committee (Rule 35) and *United States v. Benz*, 282 U.S. 304. There is no indication that the Rule was intended to permit this power to be exercised indefinitely, well after service of the sentence, upon some showing of excusable neglect in failing to move within the time fixed. Rather, the rule is that a sentence cannot be reduced after 60 days, regardless of excuse. *United States v. Hunter*, 162 F. 2d 644 (C.A. 7). Cf. *Affronti v. United States*, 350 U.S. 79, where this Court held that the power to grant probation ceases with respect to all parts of a single cumulative sentence upon imprisonment under the first part.

In short, the last part of Rule 45(b) discloses an intent to exempt certain provisions from the general rule permitting the court to allow compliance, where there has been excusable neglect, after the time fixed by the Rules has expired. As to the few instances where prompt action was regarded as desirable—new trial, arrest of judgment, reduction of sentence, and appeal—the court is given no power to act after the time fixed by the Rules.

The Court of Appeals below felt its interpretation of Rule 45(b) as prohibiting only pre-expiration en-

largements was "sound" because of a "rational basis for exceptions in exceptional circumstances." This "rational" basis for distinction was that, "If he can make a timely application for an extension of time, he can readily and with less effort file the notice of appeal itself" (R. 22).⁴ But this rationale does not apply at all to motions under Rules 33, 34, and 35—none of which is as simple as filing a notice of appeal.⁵ It is evident that the prohibition against enlargement in Rule 45(b) is not directed at saving effort on the part of the defendant, but at securing prompt disposition of the cause. This is made explicit by the history of the Rules, discussed *infra*, pp. 18 ff.

C. The construction by the court below violates the standards of Rule 2

Rule 2 establishes the standards for construing the Criminal Rules. It provides:

The rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedures, fairness in administration and the elimination of unjustifiable expense and delay.

⁴Similar reasoning has been recently applied by the Court of Appeals for the District of Columbia Circuit in a civil case, *Conway v. Pennsylvania Greyhound Lines*, 243 F. 2d 39, and as an alternate reason in a criminal case, *Blunt v. United States*, 244 F. 2d 355, distinguished *infra*, p. 28, fn. 20.

⁵The reasoning of the court below assumes that there could be no purpose to ask for an extension rather than file a timely appeal. On the contrary, if pre-expiration extensions were permitted, the district court would still retain jurisdiction and more time could be allowed to determine policy questions bearing upon ability to retain other counsel or provide further time to check the advisability of filing and preparing further post-trial motions.

It is therefore not sufficient to say that Rule 45(b) "can" be read as the Court of Appeals read it. Only that reading of the Rule which is within the spirit and standards set down in Rule 2 is permissible. The interpretation given by the Court of Appeals does not, we submit, secure simplicity and fairness, or eliminate delay.

That it does not secure simplicity or fairness seems clear, not only because of all the individuals who have been denied such relief in the past, but also because it substitutes for the present uniform treatment an individualistic discretion to be exercised at "any" time. Above all, this interpretation does not "eliminate delay". Rather, it encourages delay by substantially weakening the prohibition against an untimely appeal. If an appeal should be allowed here, *a fortiori* it should be allowed in cases where, after sentence, a defendant's attorney is no longer retained. In such a case, if the reasoning of the court below is correct, almost every defendant who is not an attorney can claim excusable neglect in not knowing the time limitation for an appeal.

Conceivably, excusable neglect could extend the time to appeal for months or even years. In *Sunal v. Large*, 332 U.S. 174, this Court refused to allow *habeas corpus* to do the service of an appeal. There, as here, the Court of Appeals viewed the failure to appeal as "excusable". *Id.* 181. Untimely appellate jurisdiction could probably have been granted under the view expressed below. However, neither the majority nor minority of this Court in *Sunal* intimated that belated appellate review was even remotely pos-

sible. If the interpretation below of Rule 45(b) is to prevail, there may be a substantial claim, even at this late date, of the right to appeal in all *Sunal*-type cases. Whenever relief is denied under 28 U.S.C. 2255 because the issue is one which could be raised only on appeal, it would perhaps be possible to return to the district court and ask to appeal on the grounds of excusable neglect. Cf. *McAbee v. United States*, 261 F. 2d 744 (C.A.D.C.). Thus, the ruling below appears to mean in effect that there is no effective time limit for appeal, contrary to the spirit of Rule 2.

II. The background, legislative history, and consistent construction of the Rules show that the time for appeal was intended to be fixed beyond possibility of extension by the district court in the exercise of its discretion

A. The 1934 Rules governing appeals in criminal cases interpreted the time for appeal as jurisdictional

As this Court noted in *Carroll v. United States*, 354 U.S. 394, 400, the right of appeal in criminal cases in federal courts is relatively recent. After the right of appeal as a matter of course was recognized, Congress became concerned with the delays resulting from such appeals. By the Act of February 24, 1933, 47 Stat. 904 (now 18 U.S.C. 3772), Congress first gave this Court authority to promulgate rules regulating the time and manner of taking appeals in criminal cases. The House Report prepared to accompany this Act stated, pp. 1-2:⁶

Existing rules of the United States district courts and circuit courts of appeals lend themselves to delay. Many cases are now pending in

⁶ H. Rep. No. 2047, 72d Cong., 2d sess., to accompany S. 4020.

the Federal courts where months and even years have elapsed since the verdicts of guilty, and the cases have not been finally disposed of in the United States circuit courts of appeals and the accused have been at large on bail. Nothing tends more to discredit the administration of criminal justice than such delays * * *.

The first Criminal Appeals Rules under this Act were the thirteen Rules promulgated May 7, 1934, to be effective September 1, 1934. 292 U.S. 661-670. Rule III (App., *infra*, p. 36), provided a 5-day time limit upon taking appeals from a judgment of conviction, and there was no separate Rule on enlargement comparable to present Rule 45(b).⁷ The time for petitioning for a writ of certiorari was fixed by Rule XI.

The time for appeal was generally understood to be jurisdictional. Professor Orfield, a member of the Advisory Committee on Rules of Criminal Procedure, stated in an interpretive article, *The Federal Criminal Appeals Rules*, 21 North Carolina Law Review 28, 41:

A main purpose of the rules is to force early termination of criminal cases. * * * The time limit fixed by rule is jurisdictional. * * *

In *United States ex rel. Coy v. United States*, 316 U.S. 342, the defendant had made a motion to correct sentence on the ground that two counts of an indictment on which consecutive sentences had been imposed charged only one offense. An appeal from an order of denial was allowed more than 5 days there-

⁷ Rule 45(a) on computation of time was covered in part by Old Rule XIII.

after but within the 3-month period prescribed by Section 8(c) of the Act of February 13, 1925, 43 Stat. 940, fixing the time generally for allowance of an appeal to the court of appeals. After affirmance by the court of appeals, a petition for a writ of certiorari was filed in this Court more than 30 days after the judgment of the court of appeals. After consideration of the issue of timeliness, this Court dismissed the writ. It held that while Rule III did not apply to the order in that case (since its 5-day limit referred to 5 days after judgment of conviction) the proceeding was nevertheless one in the criminal case, with the result that Rule XI governed the time for a petition for a writ of certiorari. The Court stated, 316 U.S. at 345:

* * * since the purpose in adopting the Rules was to expedite criminal appeals, and the Rules in terms apply to petitions for certiorari in criminal cases, the express requirements of Rule XI cannot rightly be disregarded * * *.

In the courts of appeals, the 5-day limit on appeals from judgments of conviction was uniformly held to be jurisdictional, and untimely appeals were dismissed regardless of the importance of the question or the excuse. See, for example, *Nix v. United States*, 131 F. 2d 857 (C.A. 5), certiorari denied, 318 U.S. 771; *United States v. Infusino*, 131 F. 2d 617 (C.A. 7); *Miller v. United States*, 104 F. 2d 343 (C.A. 5), certiorari denied, 308 U.S. 549; *United States v. Tousey*, 101 F. 2d 892 (C.A. 7); *O'Gwin v. United States*, 90 F. 2d 494 (C.A. 9); *Burr v. United States*, 86 F. 2d 502 (C.A. 7), certiorari denied, 300 U.S. 664;

Fewor v. United States, 77 F. 2d 699 (C.A. 5). The courts sometimes interpreted broadly the nature of the document which would serve as a notice of appeal,⁸ but the time for appeal was regarded as a definite requirement which could not be set aside. See also in this connection *United States v. Hark*, 320 U.S. 531, 533, where, in referring to the 30-day limitation in the Criminal Appeals Act, this Court said: "Neither the District Court nor this court has power to extend the period", and at p. 535, "The judge was conscious, as we are, that he was without power to extend the time for appeal." It was against this background of rigid interpretation of the time for appeal that the present Criminal Rules were drawn.⁹

B. The history of the present Rules shows that a rigid time for appeal was intended

Under the Act of June 25, 1948, 62 Stat. 846, as amended (now 18 U.S.C. 3771), the Supreme Court was authorized to prescribe criminal Rules to and including verdict, which could become effective by passive acceptance in Congress.

Under this and the previous authority, and with the aid of an advisory committee, the Court promul-

⁸ Cf. *Boykin v. Huff*, 121 F. 2d 865 (C.A.D.C.), a *habeas corpus* case where the defendant had no lawyer and wrote a timely letter which was held to be a timely appeal; *Scott v. United States*, 145 F. 2d 405 (C.A. 10), certiorari denied, 323 U.S. 801, where the notice was timely filed, but the United States Attorney was not notified in accord with the Rule, it was held that the appeal was timely.

⁹ That the former Rules had the effect of eliminating delay is shown by the study in 52 *Harvard Law Review* 983-992, where the tables show a considerable reduction in delay.

gated a complete set of Rules both before and after verdict. Rules 32 through 39 became effective by order of Court, 327 U.S. 825, and the remaining Rules after acceptance by Congress. The effective date was March 21, 1946.

Both the present appeal Rule (37(a)(2)) and the present enlargement Rule (45(b)) went through a number of draft changes before being prescribed. While the first preliminary draft made the change from 5 days to 10 days in the time limit for taking an appeal, of more significance is other wording in the preliminary draft of the appeal Rule, which stated:¹⁰

When a court imposes sentence upon a defendant represented by counsel appointed by the court or not represented by counsel, the court shall ask the defendant whether he wishes to appeal. If the defendant answers in the affirmative, the court shall direct the clerk forthwith to prepare, file, and serve on behalf of the defendant a notice of appeal *or shall extend the time specified by rule for the filing of a notice of appeal.* * * * [Emphasis added.]

In conformity with this extension provision, the preliminary Rule on enlargement¹¹ was worded in part:

¹⁰ Federal Rules of Criminal Procedure, Preliminary Draft, with Notes and Forms, Prepared by the Advisory Committee on Rules of Criminal Procedure, United States Government Printing Office, 1943, Appeal Rule then No. 35(a)(2), p. 152.

¹¹ *Id.* Enlargement Rule then No. 41(b), p. 179. Also the note to this Rule stated that it " * * * is an adaptation for all criminal proceedings of Fed. Rules Civ. Proc., Rule 6 (Time)," p. 180.

* * * but it may not enlarge * * * the period for taking an appeal except as provided in Rule 35(a)(2).

This limited provision for an extension of the time within which to appeal was entirely eliminated by the time of the Second Preliminary Draft,¹² and never reappeared. And it is clear that the advisory committee, when drafting these Rules, had in mind the precise problem of the time limit for appeal which was being imposed. The Note to Rule 35 in the Preliminary Draft,¹³ *supra*, p. 155, stated:

On the question of time with respect to appealable orders, see *United States ex rel. Coy v. United States*, 316 U.S. 342.

While the reference here is to the aspect of the *Coy* case which found a *casus omissus* on appeals from orders, the committee must also have known of its ruling with respect to the timeliness of a petition for a writ of certiorari. See the discussion of that case, *supra*, pp. 19-20. Hence, it is clear that the advisory committee knew (1) how to provide an extension of time for appeal, but deliberately expunged even the limited provision preliminarily suggested, and (2) was aware that an untimely appeal would be barred.

There are two other matters which indicate that it was deliberately decided not to provide any extension of the time to take an appeal. First, in

¹² Federal Rules of Criminal Procedure, Second Preliminary Draft, with Notes and Forms, Prepared by the Advisory Committee on Rules of Criminal Procedure, United States Government Printing Office, February 1944, Appeal Rule then No. 39(a)(2), p. 135.

¹³ Also in the Second Preliminary Draft, *supra*, p. 138.

England 10 days are provided for appeal or leave to appeal, but this "may be extended at any time by the Court of Criminal Appeal." Criminal Appeal Act, 1907 (7 Edw. 7, c. 23, section 7(1)).¹⁴ This provision was probably known to all of the members of the advisory committee, and at least two have recorded their awareness of the English Act. See Orfield, *The Preliminary Draft of The Federal Rules of Criminal Procedure*, 22 *Texas Law Review* 194, 217, fn. 322; Longsdorf, *Monograph on The Beginnings and Background of Federal Criminal Procedure*, pp. 59-60, 4 Barron, *Federal Practice and Procedure*. Second, it would seem that, if the enlargement provision of Rule 45(b) created the right to permit an appeal after the 10-day period, there would have been considerable comment on this change.¹⁵ But the members of the advisory committee who have written on the Rules make no such suggestion. Longsdorf, *op. cit. supra*, pp. 62-63, 77-78; Orfield, *op. cit. supra*, p. 217; Orfield, *The Federal Criminal Appeals Rules*, 21 *North Carolina Law Review* 28, 43; Dession, *The New Federal Rules of Criminal Procedure: II*, 56 *Yale Law Journal* 197, 238, 248; *Federal Rules of Criminal Procedure, with Notes and Institute Proceedings*, New York University School of Law Institute—Proceedings, Vol. VI, 1946, pp. 57-59, 78-80, 208; see also Robertson and

¹⁴ XIV The Statutes Revised, Third Edition, 1950. See also Archbold's *Criminal Pleading, Evidence & Practice*, 1943 ed., 277, 281. There are also significant differences in appeals, such as whether the appeal is from the verdict (Criminal Appeal Rule 18) or from the sentence (Criminal Appeal Rule 19). See *Statutory Rules and Orders and Statutory Instruments Rev. to December 31, 1948*, Vol. V.

¹⁵ Cf. *United States v. Smith*, 331 U.S. 469, 473, fn. 2.

Kirkham, *Jurisdiction of the Supreme Court of the United States*, rev. ed., 1951, § 178, p. 323.¹⁶

The prototype for Criminal Rule 45(b) was the then Rule 6 of the Federal Rules of Civil Procedure.¹⁷ At the time the present Criminal Rules were being prepared, the limiting clause of Rule 6(b) of the Civil Rules stated,

* * * but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law.

Under the Rule as so worded, it was held that the time for appeal (at that time fixed in civil cases by various statutes) could not be extended. *United Drug Co. v. Helvering*, 108 F. 2d 637 (C.A. 2); *Alexander v. Special School District of Boonerville*, 132 F. 2d 355 (C.A. 8); *Tinkoff v. West Publishing Co.*, 138 F. 2d 607 (C.A. 7), certiorari denied, 322 U.S. 740; *Lamb v. Shasta Oil Co.*, 149 F. 2d 729 (C.A. 5); *Federal Deposit Insurance Corporation v. Congregation Poiley Tzedek*, 159 F. 2d 163 (C.A. 2).

Rule 6(b) was amended effective March 19, 1948,¹⁸ so that the clause in the subdivision on enlargement read:

¹⁶ It should also be noted that the time limit was in conformity with other Rules in achieving uniformity of treatment, following the elimination of the significance of the term of court by Rule 45(c).

¹⁷ The Notes of Advisory Committee on Rules of Criminal Procedure (Rule 45), state, "The rule is in substance the same as Rule 6 of the Federal Rules of Civil Procedure * * *."

¹⁸ Subsequent to March 21, 1946, the effective date of the present Criminal Rules.

* * * the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50 (b), 52 (b), 59 (b), (d) and (e), 60 (b), and 73 (a) and (g), except to the extent and under the conditions stated in them.

The Notes of Advisory Committee on Amendments to Rules of Civil Procedure (Rule 6) state:

The phrase "extend the time" is substituted for "enlarge the period" because the former is a more suitable expression and relates more clearly to both clauses (1) and (2). * * *

This change was characterized by the committee as "merely clarifying and conforming".

Thus, all the background evidence indicates that the interpretation below was not intended. To the contrary, all available data shows that the intent of the Criminal Rules was that under no circumstances could the jurisdictional time limitation as to appeals be altered.

C. The prior cases interpreting the criminal appeal Rule have never permitted an untimely appeal

Until the present case, the 10-day period fixed by Rule 37(a)(2) has been interpreted uniformly to be jurisdictional, and untimely appeals have been dismissed regardless of the excuse or merits of the cases.

See *Martin v. United States*, 263 F. 2d 516 (C.A. 10); *Bryant v. United States*, 261 F. 2d 229 (C.A. 6); *United States v. Isabella*, 251 F. 2d 223 (C.A. 2); *Banks v. United States*, 240 F. 2d 302 (C.A. 9); *Wagner v. United States*, 220 F. 2d 513 (C.A. 4); *Kirksey v. United States*, 219 F. 2d 499 (C.A.D.C.); *Brant v. United States*, 210 F. 2d 470 (C.A. 5); *McIntosh v. United States*, 204 F. 2d 545 (C.A. 5); *Huff v. United States*, 192 F. 2d 911 (C.A. 5), certiorari denied, 342 U.S. 946; *Marion v. United States*, 171 F. 2d 185 (C.A. 9), certiorari denied, 337 U. S. 944; *Swihart v. United States*, 169 F. 2d 808 (C.A. 10), *United States v. Froehlich*, 166 F. 2d 84 (C.A. 2); *United States v. Bloom*, 164 F. 2d 556 (C.A. 2), certiorari denied, 333 U.S. 857; *Jensen v. United States*, 160 F. 2d 104 (C.A. 10), certiorari denied, 331 U.S. 846. We have been unable to find one case outside the District of Columbia which has interpreted Rule 45(b) to allow a post-expiration filing, and the majority below have cited no authority for their holding. The Court of Appeals for the District of Columbia Circuit itself had previously recognized this prevailing ruling. See *Kirksey v. United States*, 219 F. 2d 499, and *Richards v. United States*, 192 F. 2d 602, fn. 2 at p. 604, certiorari denied, 342 U.S. 946. There have been problems of interpretation, such as when the time starts¹⁹ and of notices

¹⁹ *Wallace v. United States*, 174 F. 2d 112 (C.A. 8), certiorari denied, 337 U.S. 947; *Oddo v. United States*, 171 F. 2d 854 (C.A. 2); *Carter v. United States*, 168 F. 2d 310 (C.A. 10); *Remine v. United States*, 161 F. 2d 1020 (C.A. 6), certiorari denied, 331 U.S. 862.

prior to judgment, *Richards v. United States*, 192 F. 2d 602 (C.A.D.C.), certiorari denied, 342 U.S. 946. And there have even been cases which upheld an appeal years after the judgment, where some timely notice was discovered.²⁰ But no case has been found, other than the decision below, which allowed a late filing for excusable neglect.

Typical of this uniform and consistent judicial interpretation is the recent *Isabella* case, *supra*, in the Second Circuit, where the court in a unanimous opinion stated, 251 F. 2d at 225:

The question in this case is one of power; for, if this Court had discretion in the matter we might well exercise it in favor of the prisoner.

It has long been settled law that where a notice of appeal is filed too late no conduct thereafter on the part of the appellee can constitute a waiver or give the appellate court competence to hear and determine the alleged appeal. The timely service of the notice of appeal is the sole legal basis for the authority of the appellate court to proceed.

The unanimity of views among the courts of appeals until the decision below suggests, in itself, that the language of Rule 45(b) is not subject to the ambiguities which the District of Columbia Circuit would now read into it.

III. Any change in the Rule with respect to the time for appeal should come by the normal rule-making procedure

For the reasons discussed above, we submit that the language, history, and settled construction of the

²⁰ *Blunt v. United States*, 244 F. 2d 355 (C.A.D.C.); *Belton v. United States*, 259 F. 2d 811 (C.A.D.C.).

Federal Rules of Criminal Procedure do not permit the reading of Rule 45(b) adopted below, and that the ten days fixed by Rule 37(a)(2) marks the limit of the time for notice of appeal, without any possibility of extension thereafter.

Under the guise of construction, the court below has undertaken to change the policy embodied in the Rules. If a change in the Rules is to be made, this is not the way to proceed. As this Court pointed out in its recent decision in *United States v. Isthmian Steamship Co.*, 359 U.S. 314, there is an established procedure for amending the Rules. What was said of the problem there is equally applicable here (p. 323):

We think that if the law is to change it should be by rulemaking or legislation and not by decision.

The Federal Rules of Criminal Procedure, promulgated by this Court, establish the uniform procedure in all federal courts. There is no question here of the power of a court to waive its own rules. Cf. *Heflin v. United States*, 358 U.S. 415. Under 18 U.S.C. 3772, this Court (and no lower court) can directly change the Rule governing the time and manner of taking an appeal. The policy considerations in favor of or against greater flexibility can be explored and resolved. But if a change is to be made, we believe that it should be by the adoption of a new Rule and not by distorting the settled language of the old.

That there may be policy arguments for or against greater flexibility is self-evident. On the one hand, it may be that, as the court below believes, there

ought to be some relief from rigid time requirements for excusable neglect.²¹ On the other hand, as pointed out above, if there is no fixed time an appeal may be delayed for years and a change in the law be deemed a sufficient showing of excusable neglect so as to warrant review years later. Considering that there are now several remedies by way of collateral attack available for denial of truly basic rights,²² there is much to be said for requiring at least orderly and prompt notice that review is to be sought of the kind of trial errors which are cognizable only on direct appeal. Once notice is given, appropriate steps may be taken to prepare the record and briefs, under flexible time limits controlled by the Court of Appeals. As this Court stated in *Carroll v. United States*, 354 U.S. 394, 406, 415:

* * * form is substance with respect to ascertaining the existence of appellate jurisdiction. * * *

* * * * *

Delays in the prosecution of criminal cases are numerous and lengthy enough without sanctioning appeals that are not plainly authorized by statute.²³

²¹ Most courts have rejected any excuse by employed counsel to the effect they were not aware of the law. See the dissent below (R. 24-25).

²² In addition to motions under 28 U.S.C. 2255, there is the remedy by a motion to correct sentence under Rule 35 and a writ of error *coram nobis*.

²³ For many years this Court has rigidly applied the statutory time limitations on petitions for certiorari and appeals to this Court (now 28 U.S.C. 2101), and it has dispensed with strict

The way to resolve these conflicting considerations is by the rule-making process which can obtain the necessary data and canvass all the appropriate factors. Certainly, it would seem that if there is to be more flexibility, there should be some time limitation even in the case of excusable neglect. This a Rule could fix, but the construction by the court below does not and cannot do so. The present Rules designedly chose the solution of a rigid fixed time for notice of appeal, coupled with flexibility as to the time within which to prepare the record and briefs. Whatever the present merit or lack of merit in that approach, the court below exceeded its authority when, in effect, it rewrote Rule 45(b).

CONCLUSION

It is respectfully submitted that the judgment of the court below should be reversed.

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JULY 1959.

compliance with the time requirements for certiorari in criminal cases, which are set by the Court's *own* rule, only to achieve a consistent rule of law or to avoid delay. See *Heflin v. United States*, 358 U.S. 415, 418, fn. 7.

APPENDIX

1. 18 U.S.C. 3771 provides:

Procedure to and including verdict.

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the Territory of Alaska, the district of the Canal Zone and the Virgin Islands, in the Supreme Courts of Hawaii and Puerto Rico, and in proceedings before United States commissioners. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

2. 18 U.S.C. 3772 provides:

Procedure after verdict.

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict,

or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt in the United States district courts, in the district courts for the Territory of Alaska, the District of the Canal Zone and the Virgin Islands, in the Supreme Courts of Hawaii and Puerto Rico, in the United States courts of appeals, and in the Supreme Court of the United States. This section shall not give the Supreme Court power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.

The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

3. Federal Rules of Criminal Procedure:

(i). Rule 2 provides:

Purpose and Construction.

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure sim-

plicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

(ii). Rule 33 provides:

New Trial.

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

(iii). Rule 34 provides:

Arrest of Judgment.

The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period.

(iv). Rule 35 provides:

Correction or Reduction of Sentence.

The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Su-

preme Court denying an application for a writ of certiorari.

(v). Rule 37(a)(1) provides:

(a) *Taking Appeal to a Court of Appeals.*

(1) *Notice of Appeal.* An appeal permitted by law from a district court to a court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate. Petitions for allowance of appeal, citations and assignments of error in cases governed by these rules are abolished. The notice of appeal shall set forth the title of the case, the name and address of the appellant and of appellant's attorney, a general statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, the place of confinement if the defendant is in custody and a statement that the appellant appeals from the judgment or order. The notice of appeal shall be signed by the appellant or appellant's attorney, or by the clerk if the notice is prepared by the clerk as provided in paragraph (2) of this subdivision. The duplicate notice of appeal and a statement of the docket entries shall be forwarded immediately by the clerk of the district court to the clerk of the court of appeals. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to adverse parties, but his failure so to do does not affect the validity of the appeal.

(vi). Rule 45(c) provides:

Unaffected by Expiration of Term.

The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act in a criminal proceeding.

4. Rule III of the Criminal Appeals Rules of 1934, 292 U.S. 662, provided in pertinent part:

III. *Appeals*.—An appeal shall be taken within five (5) days after entry of judgment of conviction, except that where a motion for a new trial has been made within the time specified in subdivision (2) of Rule II, the appeal may be taken within five (5) days after entry of the order denying the motion.

Petitions for allowance of appeal, and citations, in cases governed by these rules are abolished.

5. Federal Rules of Civil Procedure:

(i). Rule 6(b) provides:

Enlargement.

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50 (b), 52 (b), 59 (b), (d) and (e), 60 (b), and 73 (a) and (g), except to the extent and under the conditions stated in them.

(ii). Rule 73(a) provides:

When and How Taken.

When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided

by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50 (b); or granting or denying a motion under Rule 52 (b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation, filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant.

SUPREME COURT OF THE UNITED STATES

No. 16.—OCTOBER TERM, 1959.

United States, Petitioner,	{	On Writ of Certiorari to the
Troyit Robinson et al.		United States Court of Appeals for the District of Columbia Circuit.

[January 11, 1960.]

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

Respondents were indicted for murder in the District Court for the District of Columbia, and upon a trial were found guilty by a jury of the lesser included offense of manslaughter. After their motions for a new trial were considered and denied, the Court entered judgment of conviction on May 7, 1958. Twenty-one days thereafter, on May 28, respondents separately filed in the District Court their notices of appeal. On the same day they each asked, and were granted by the District Court, leave to prosecute their appeals *in forma pauperis*. On June 30, the Government moved the Court of Appeals to dismiss respondents' appeals for want of jurisdiction, because their notices of appeal were not filed within 10 days after entry of the judgment. In opposition to the motion, affidavits of respondent Travit Robinson, and of counsel for both respondents, were filed in the Court of Appeals. They tended to show that the late filing of the notices of appeal was due to a misunderstanding as to whether the notices were to be filed by respondents themselves or by their counsel.¹

¹ Travit Robinson's affidavit was, in essence, as follows: On "the day of sentencing, I advised my attorney that I was going to appeal the case. . . . I told him that from [what] other inmates at the

The Court of Appeals, one judge dissenting, held that the notices of appeal, although filed 11 days after expiration of the time prescribed in Rule 37 (a) (2) of the Federal Rules of Criminal Procedure, were sufficient to confer jurisdiction of the appeals if the District Court actually had found, under Rule 45 (b), that the failure to file the notices of appeal within 10 days after entry of the judgment "was the result of excusable neglect." Being unable to determine from the record whether the District Court had so found, the Court of Appeals, on October 2, remanded to the District Court "for supplementation of the record" on that score, meanwhile holding in abeyance the Government's motion to dismiss. On October 8, the District Court "ordered that the record reflect that the appeals were allowed and failure to act was due to excusable neglect under Rule 45 (b) of the Federal Rules of Criminal Procedure." On November 5, the Court of Appeals *en banc*, two judges dissenting, denied the Government's petition for rehearing, 260 F. 2d 718. Because of the importance of the question to the proper and uniform administration of the Federal Rules of Criminal Procedure, we granted certiorari. 358 U. S. 940.

District Jail [had told me] I knew I could appeal the judgment but [I] did not file the necessary appeal paper, thinking that my attorney would do it, while I now understand he thought I would do it. We misunderstood each other and I now find that I gave him the wrong impression as to what I wanted done and that he misunderstood what I was going to do or wanted to do."

The affidavit of respondents' counsel substantially conformed to Travis Robinson's affidavit and further recited: "I was under the impression that he was going to [file the notice of appeal] without me, [and also] I neglected to differentiate the rules as to appealing this type of a case [from the Rules applying to the appeal] of a civil case."

² All references to Rules are to the Federal Rules of Criminal Procedure unless otherwise stated.

The single question presented is whether the filing of a notice of appeal in a criminal case after expiration of the time prescribed in Rule 37 (a)(2) confers jurisdiction of the appeal upon the Court of Appeals if the District Court, proceeding under Rule 45 (b), has found that the late filing of the notice of appeal was the result of excusable neglect.

There being no dispute about the fact that the notices of appeal were not filed within the 10-day period prescribed by Rule 37 (a)(2),³ the answer to the question presented depends upon the proper interpretation of Rule 45 (b). It provides:

"Enlargement.—When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal."

³ Rule 37 (a)(2) of Fed. Rules Crim. Proc. provides:

"Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant."

In interpreting that Rule, the Court of Appeals took the view that, although "the District Court has no authority to grant a greater period than 10 days for taking an appeal, [i]t may, however, if satisfied that the failure to note an appeal within 10 days is excusable, permit late filing." It thought that there was "ample justification in reason for different treatment of pre-expiration and post-expiration applications"; that if a defendant "can make a timely application for an extension of time, he can readily and with less effort file the notice of appeal itself." But if, "for some cause amounting legally to 'excusable neglect' the party fails to take any action during the prescribed time, the rule seems plainly to allow the District Court discretion to permit him to file a late notice of appeal." It thought that so doing would not be to "enlarge" the period for taking an appeal, but rather would be only to "permit the act to be done" after expiration of the specified period. This conclusion has, at least, enough surface plausibility to require a detailed examination of the language, judicial interpretations, and history of Rule 45 (b) and the related Federal Rules of Criminal Procedure.

On its face, Rule 45 (b) appears to be quite plain and clear. It specifically says that "the court may not enlarge . . . the period for taking an appeal." We think that to recognize a late notice of appeal is actually to "enlarge" the period for taking an appeal. Giving the words of 45 (b) their plain meaning, it would seem that the conclusion of the Court of Appeals is in direct conflict with that Rule. No authority was cited by the Court of Appeals in support of its conclusion, nor is any supporting authority cited by respondents here. The Government insists, it appears correctly, that there is no case that supports the Court of Appeals' conclusion. Every other decision to which we have been cited, and that we have found, holds that the filing of a notice of appeal within

the 10-day period prescribed by Rule 37 (a)(2) is mandatory and jurisdictional.⁴

It is quite significant that Rule 45 (b) not only prohibits the court from enlarging the period for taking an appeal but, by the same language in the same sentence, also prohibits enlargement of the period for taking any action under Rules 33, 34 and 35, except as provided in those Rules. That language is: "... but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those Rules, or the period for taking an appeal." If, as the Court of Appeals has held, the delayed filing of a notice of appeal—found to have resulted from "excusable neglect"—is sufficient to confer jurisdiction of the appeal, it would consistently follow that a District Court may, upon a like finding, permit delayed filing of a motion for new trial under Rule 33,⁵ of a motion in arrest of judgment

⁴ See, e. g., *Martin v. United States*, 263 F. 2d 516 (C. A. 10th Cir.); *Bryant v. United States*, 261 F. 2d 229 (C. A. 6th Cir.); *United States v. Isabella*, 251 F. 2d 223 (C. A. 2d Cir.); *Banks v. United States*, 240 F. 2d 302 (C. A. 9th Cir.); *Wagner v. United States*, 220 F. 2d 513 (C. A. 4th Cir.); *Kirksey v. United States*, 219 F. 2d 499 (C. A. D. C. Cir.); *Brant v. United States*, 210 F. 2d 470 (C. A. 5th Cir.); *McIntosh v. United States*, 204 F. 2d 545 (C. A. 5th Cir.); *Marion v. United States*, 171 F. 2d 185 (C. A. 9th Cir.); *Swihart v. United States*, 169 F. 2d 808 (C. A. 10th Cir.); *United States v. Froehlich*, 166 F. 2d 84 (C. A. 2d Cir.).

It is thus made to appear that the court below, as itself recognized and enforced this Rule in *Kirksey v. United States*, *supra*, as it did also in *Richards v. United States*, 192 F. 2d 602, n. 2, at 604.

⁵ Rule 33 of Fed. Rules Crim. Proc., in pertinent part, provides:

"... A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period." (Emphasis added.)

under Rule 34,⁶ and the reduction of sentence under Rule 35,⁷ at any time—months or even years—after expiration of the periods specifically prescribed in those Rules.

This is not only contrary to the language of those Rules, but is contrary to the decisions of this Court. In *United States v. Smith*, 331 U. S. 469, it was held that the power of the District Court *sua sponte* to grant a new trial under Rule 33 is limited to the time fixed in that Rule. There, quite like here, it was argued "that because the literal language of the Rule places the 5-day limit only on the making of the motion [for a new trial], it does not limit the power of the Court later to grant [a new trial]" 331 U. S., at 473. This Court rejected the contention that such power "lingers on indefinitely," and pointed out that the Rules, in abolishing the limitation based on the Court Term, did not substitute indefiniteness, but prescribed precise times within which the power of the courts must be confined. 331 U. S., at 474. (See also *Marion v. United States*, 171 F. 2d 185 (C. A. 9th Cir.); *Drown v. United States*, 198 F. 2d 999 (C. A. 9th Cir.). The same rule must apply with respect to the time within which a motion in arrest of judgment may be filed under Rule 34. Similarly, it has been held that a District Court may not

⁶ Rule 34 of Fed. Rules Crim. Proc. provides:

"The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix *during* the 5-day period." (Emphasis added.)

⁷ Rule 35 of Fed. Rules Crim. Proc. provides:

"The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari."

reduce a sentence under Rule 35 after expiration of the 60-day period prescribed by that Rule regardless of excuse. *United States v. Hunter*, 162 F. 2d 644 (C. A. 7th Cir.). Cf. *Affronti v. United States*, 350 U. S. 79.

The right of appeal in criminal cases in federal courts is of relatively recent origin. *Carroll v. United States*, 354 U. S. 394, 400. By the Act of February 24, 1933, 47 Stat. 904, now 18 U. S. C. § 3772, Congress first gave this Court authority to promulgate rules regulating the time and manner for taking appeals in criminal cases. One of the principal purposes was to eliminate delays in such appeals. H. R. Rep. No. 2047, 72d Cong., 2d Sess., to accompany S. 4020. The first Criminal Appeals Rules promulgated under that Act were the 13 Rules effective September 1, 1934. 292 U. S. 661-670. Rule III provided a 5-day time limit for the taking of an appeal from a judgment of conviction. It was uniformly held that Rule III was mandatory and jurisdictional, and appeals not taken within that time appear always to have been dismissed regardless of excuse.*

From this review, it would seem that there is nothing in the language of Rule 45 (b), or in the judicial interpretations of that Rule or its predecessor, which support the conclusion of the Court of Appeals. We turn, then, to the history of Rule 45 (b) to see whether any support for the court's conclusion can be found in that source.

Under the Act of June 25, 1948, 62 Stat. 846, as amended (now 18 U. S. C. § 3771), this Court was authorized to prescribe Rules of Criminal Procedure to and

* See, e. g., *Nix v. United States*, 131 F. 2d 857 (C. A. 5th Cir.); *United States v. Infusino*, 131 F. 2d 617 (C. A. 7th Cir.); *Miller v. United States*, 104 F. 2d 343 (C. A. 5th Cir.); *United States v. Tousey*, 101 F. 2d 892 (C. A. 7th Cir.); *O'Gwin v. United States*, 90 F. 2d 494 (C. A. 9th Cir.); *Burr v. United States*, 86 F. 2d 502 (C. A. 7th Cir.); *Flewox v. United States*, 77 F. 2d 699 (C. A. 5th Cir.). And compare *United States ex rel. Coy v. United States*, 316 U. S. 342, and *United States v. Hark*, 320 U. S. 531, 533.

including verdict, which would become effective upon passive acceptance by Congress. Under that Act and the previous authority (the Act of February 24, 1933, 47 Stat. 904—now 18 U. S. C. § 3772), and with the aid of an advisory committee, this Court promulgated the Federal Rules of Criminal Procedure. Rules 32 through 39 were made effective by order of the Court, 327 U. S. 825, and the remaining Rules became effective by acceptance of Congress. What are now Rules 37 (a)(2) and 45 (b) underwent a number of draft changes before adoption. The first preliminary draft of Rule 37 (a)(2) changed from 5 days to 10 days the time limit for the taking of an appeal, but of more significance is the fact that the preliminary draft of that Rule stated, in effect, that when a court imposes sentence upon a defendant, represented by appointed counsel or not represented by any counsel, the court shall ask the defendant whether he wishes to appeal and, if he answers in the affirmative, "the court shall direct the clerk forthwith to prepare, file, and serve on behalf of the defendant a notice of appeal or *shall extend the time specified by rule for the filing of a notice of appeal.*" (Emphasis added.) In conformity with that draft proposal, the preliminary draft of what is now Rule 45 (b) ¹⁰ stated: ". . . but it may not enlarge . . . the period for taking an appeal except as provided in Rule 35 (a)(2)." The limited provision for an extension of the time within which to appeal that was contained in

⁹ Federal Rules of Criminal Procedure, Preliminary Draft, with Notes and Forms, Prepared by the Advisory Committee on Rules of Criminal Procedure, United States Government Printing Office, 1943, Appeal Rule then No. 35 (a)(2), p. 152.

¹⁰ What became Rule 45 (b) was then treated as Rule 41 (b). *Id.*, at p. 179. The note to this proposed Rule stated that it " . . . is an adaptation for all criminal proceedings of Fed. Rules Civ. Proc., Rule 6 (Time)." *Id.*, at p. 180.

the First Preliminary Draft of those Rules was eliminated by the Second Preliminary Draft¹¹ and never reappeared. This seems almost conclusively to show a deliberate intention to eliminate any power of the courts to extend the time for the taking of an appeal.

But there is more. The prototype for Rule 45 (b) was Rule 6 of the Federal Rules of Civil Procedure.¹² When the present Criminal Rules were being prepared, the limiting clause of Rule 6 (b) of the Federal Rules of Civil Procedure stated: ". . . but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law." It had consistently been held that Civil Rule 6 (b) was mandatory and jurisdictional and could not be extended regardless of excuse.¹³ It must be presumed that the Advisory Committee and the Justices of this Court were aware of the limiting language of Civil Rule 6 (b) and of the judicial construction it had received when they prepared and adopted the Federal Rules of Criminal Procedure. No support for the conclusion of the Court of Appeals can be found in this history of Rule 45 (b).

Rule 45 (b) says in plain words that ". . . the court may not enlarge . . . the period for taking an appeal."

¹¹ Federal Rules of Criminal Procedure, Second Preliminary Draft, with Notes and Forms, Prepared by the Advisory Committee on Rules of Criminal Procedure, United States Government Printing Office, February 1944, Appeal Rule then No. 39 (a)(2), p. 135.

¹² The Notes of Advisory Committee on Rules of Criminal Procedure (Rule 45), state, "The rule is in substance the same as Rule 6 of the Federal Rules of Civil Procedure . . ."

¹³ *United Drug Co. v. Helvering*, 108 F. 2d 637 (C. A. 2d Cir.); *Alexander v. Special School District of Booneville*, 132 F. 2d 355 (C. A. 8th Cir.); *Tinkhoff v. West Publishing Co.*, 138 F. 2d 607 (C. A. 7th Cir.); *Lamb v. Shasta Oil Co.*, 149 F. 2d 729 (C. A. 5th Cir.); *Federal Deposit Insurance Corporation v. Congregation Poien Tzedek*, 159 F. 2d 163 (C. A. 2d Cir.).

The courts have uniformly held that the taking of an appeal within the prescribed time is mandatory and jurisdictional. The history of Rule 45 (b) shows that consideration was given to the matter of vesting a limited discretion in the courts to grant an extension of time for the taking of an appeal, but, upon further consideration, the idea was deliberately abandoned. It follows that the plain words, the judicial interpretations, and the history, of Rule 45 (b) not only fail to support, but actually oppose, the conclusion of the Court of Appeals, and therefore its judgment cannot stand.

That powerful policy arguments may be made both for and against greater flexibility with respect to the time for the taking of an appeal is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision. *United States v. Isthmian S. S. Co.*, 359 U. S. 314. If, by that process, the courts are ever given power to extend the time for the filing of a notice of appeal, upon a finding of excusable neglect, it seems reasonable to think that some definite limitation upon the time within which they might do so would be prescribed; for otherwise, as under the decision of the court below, many appeals might—almost surely would—be indefinitely delayed. Certainly that possibility would unnecessarily¹⁴ produce intolerable

¹⁴ The allowance of an appeal months or years after expiration of the prescribed time seems unnecessary for the accomplishment of substantial justice, for there are a number of collateral remedies available to redress denial of basic rights. Examples are: The power of a District Court under Rule 35 to correct an illegal sentence at any time, and to reduce a sentence within 60 days after the judgment of conviction becomes final; the power of a District Court to entertain a collateral attack upon a judgment of conviction and to vacate, set aside or correct the sentence under 28 U. S. C. § 2255, and proceedings by way of writ of error *coram nobis*.

uncertainty and confusion. Whatever may be the proper resolution of the policy question involved, it was beyond the power of the Court of Appeals to resolve it.

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent, as they share the view of Judge Bazelon, 260 F. 2d 718, 719, that an extension of time, granted after the 10-day period for an appeal has passed, is not an "enlargement" of the time in the narrow sense in which Rule 45 (b) uses the word.